From a Duty to a Right:
The Political Development of the Second Amendment

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Abstract

This dissertation addresses the question of how the issue of gun rights is debated and resolved in American politics. While the Supreme Court's landmark ruling in *District of Columbia v. Heller* (2008) has often been described as a distinct political win for gun rights advocates, it left open crucial political and regulatory questions that remain unsettled, including the constitutional permissibility of gun control measures and the proper balance between state and federal authority in establishing those parameters. This dissertation provides an account of the Second Amendment's political development and its interpretation as a civic, state, collective, and individual right, and how shifts in interpreting the right to keep and bear arms have changed the way competing claims of gun rights and gun control are reconciled through the political process. Doing so aligns the Second Amendment with other major changes in American politics – outside of the courts – including the growing role of the federal government, the increase in polarization and the importance of cultural issues to partisan politics, and the rise of the gun rights movement as a pivotal political force.

Using the lens of American political development, this dissertation is structured to identify critical junctures over time when changing interpretations of the Second Amendment

transformed the politics of gun control, which include policy changes, partisan realignment, and broader patterns of federalism. Detailed historical and legal research of primary sources was conducted, including analysis of newspapers, journals, correspondence, as well as early state constitutions, records from the Constitutional Convention, briefs from state legislatures regarding gun regulation, and relevant court cases. Based on this research, the evidence is sufficiently compelling to support the collectivist reading of the Second Amendment rather than the individual rights interpretation. In other words, the Second Amendment was intended to protect the states from federal encroachment by guaranteeing their right to arm their militias – not to grant an individual right – a position that was subsequently maintained by the courts until *District of Columbia v. Heller* (2008) overturned decades of precedent, further complicating the already contentious issue of gun rights in American politics.

Chapter One focuses on the historical and intellectual origins of the right to bear arms that influenced early state constitutions and gun regulations. Chapters Two through Four discuss the nature of arms-bearing during the Revolutionary era; the debates surrounding the drafting and ratification of the Second Amendment; and the crucial role of the state militia system to early notions of republican government. Subsequent chapters provide an account of the changing nature of the state militia system, ultimately resulting in the formation of the National Guard; early legal interpretations of the right to bear arms, including whether the Second Amendment applied to the states; and a comprehensive account of federal gun legislation. From there, Chapter Seven discusses the development of collective rights theory and the Supreme Court's traditional position on the Second Amendment. Chapters Eight and Nine turn to the rise of the gun rights movement; the establishment of the National Rifle Organization as an influential political actor and how the Second Amendment was politicized to advance its cause;

changes to federal gun legislation; and the development of individual rights theory and its influence on the partisan debate about gun control, including a literature review to account for the "New Standard Model" of Second Amendment scholarship. Chapter Ten analyzes the milestone decisions *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010) and also provides a detailed account of the process of incorporating the Second Amendment against the states, arguing that even though the Supreme Court established the individual right to keep and bear arms, its traditional interpretation as a states' right must be maintained in the interest of federalism. The Conclusion further advances this assertation, contending that the intense debate about gun rights in American politics could be tempered by allowing the states greater latitude to regulate both gun control and gun rights. Under a federalized system of well-regulated liberty that emphasizes state autonomy, the states would be free to either limit or expand the right to keep and bear arms based on the demands of their constituents, which balances the politics of gun control with the constitutional protections of the Second Amendment.

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Introduction:

From a Duty to a Right

In current American politics, the Second Amendment is a tribal marker, a talisman to indicate ideological leanings and the source of heated partisan debate regarding the balance of gun rights and gun control. In the academy, the Second Amendment is described by scholars in dramatic terms: it has been lost and found; it is both terrifying and embarrassing; it is at once commonplace and a phenomenon.[1] Given the vitriol political disagreement about gun rights, it would be fair to assume that the Second Amendment has been one of the most contested and litigated amendments in the Bill of Rights. However, the political history of the Second Amendment – in the legislatures, in the state and federal courts, and in public discourse – has been, until recently, relatively quiet compared to other amendments. The constitutional right established in the Second Amendment, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," was duly settled after the adoption of the Bill of Rights: the right to bear arms was widely understood to protect the right of the states to arm their local militias. Over time, state legislatures and Congress passed laws intended to carry out the Second Amendment in practice; state courts, federal district courts, and the Supreme Court articulated its legal meaning in small number of cases; meanwhile, public debate about the right to keep and bear arms was minimal, indicating

[1] See Robert J. Spitzer, "Lost and Found: Researching the Second Amendment," *Chicago-Kent Law Review* 76 (2000-2001): 349-401; Robert A. Sprecher, "The Lost Amendment," *American Bar Association Journal* 51 (1965): 554-547; David C. Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment," *Yale Law Journal* 101 (1991): 551-616; Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 637-660; Eugene Volokh, "The Commonplace Second Amendment," *New York University Law Review* 73 (1998): 805-806; and Ralph J. Rohner, "The Right to Bear Arms: A Phenomenon of Constitutional History," *Catholic University Law Review* 16 (1996): 53-84.

that there was little disagreement about the Second Amendment's fundamental meaning as a collective right to protect the states from federal encroachment.

How, then, did the issue of gun rights become one of the most contentious and polarizing debates in modern American politics? How has thinking about and application of the Second Amendment changed over time, and, further, how did shifts in interpreting the Second Amendment influence the political debate about gun rights? The most disputed phrase of the Second Amendment, the operative clause that declares "the right of the people to keep and bear Arms," contains many of the concepts implicit to these questions. What is the nature of the *right* articulated? Who are *the people*? What does it mean *to keep and bear Arms*? Further, the prefatory phrase of the Second Amendment, "A well regulated Militia, being necessary to the security of a free State," provides the contextual parameters of the right to keep and bear arms, but is often overlooked as irrelevant to the contemporary debate about gun rights. Traditional state militias were federalized into the National Guard in the early twentieth century, leaving open the question of what the Second Amendment meant given that its institutional foundation – the state militia system – no longer existed. Was a *well regulated Militia* still *necessary to the security of a free State*? If so, how was the people's right to keep and bear arms protected within a federal military scheme, and what were the implications for gun legislation? Articulating how and why competing interpretations emerged over time, and how these shifts have influenced the issue of gun rights, is vital to understanding the current debate about guns in American politics.

A Brief History

As is the case with many polarizing arguments in contemporary American politics, the concept of gun rights as a distinct political issue is a relatively new phenomenon; both gun ownership and gun regulation have been present in America since the nation's founding, but only

became politically salient in the 1960s. In the Revolutionary era, the right to bear arms was considered a civic duty in relation to a local militia regulated by regional authorities. Serving in the militia was understood as a political obligation, an assumed part of republican government to protect the colonies from tyranny, both foreign and domestic; the civic notion of the right to bear arms focused on the right of an armed citizenry to participate in the militia to defend their liberty against the threat of a tyrannical government. Further, it was linked to civic virtue: by bearing arms in a well-regulated militia, republican citizens were connected to each other and to their colonial government through common duties, training, and discipline. The notion of the local militia as a fundamental political institution was a central organizing principle at the Founding, allowing the states to protect themselves against federal encroachment – particularly the threat of standing armies – and the right to bear arms was understood to fulfill this purpose through citizen militia service.

Over time, however, the civic notion of the Second Amendment began to shift to a states' rights interpretation as the nature of the militia changed following the Revolutionary War. Even though the new Constitution mandated federal control over military matters (a position clarified in the reorganization of the militia system under the Uniform Militia Act of 1792), the states still retained power over their local militias. The Second Amendment was widely understood to protect the states from federal overstep, serving as a guarantee that the federal government could not disarm state militias. The Supreme Court sanctioned this position in *Houston v. Moore* (1820): the federal government controlled the militia but did not have exclusive jurisdiction over militia matters, leaving ample space for the states to play a role in regulating their military forces. Later, the concept of a state-mandated militia was critical to the Civil War and

Reconstruction, a time of national crisis that tested the long-held belief that a state could call forth its militia to act against a tyrannical federal government.

The states' right view of the Second Amendment remained dominant throughout the nineteenth century but began to shift to a collective right when the organization of the militia changed once again. As the notion of a "well-regulated militia" began to decline, the Second Amendment was recast as a protected right of the people as a collective body to keep and bear arms for the common defense. The militia system was dismantled in 1903 when the Militia Act federalized the state militias into the National Guard, rendering a strict states' right position untenable. Since the legal definition of the militia had changed, the text of the Second Amendment no longer referred to state militias but to the National Guard: the role of the states was diminished and the Second Amendment protected, as legal scholar Lucilius Emery described in his influential 1915 law review article, the right of "the people collectively for the common defense against a common enemy, foreign or domestic."[2] In other words, since the Second Amendment was no longer limited to the states' ability to regulate their militias, it now protected the collective body of "the people" to keep and bear arms in relation to a newly federalized militia system.

The collective rights theory of the Second Amendment dominated until the 1960s, a critical juncture when the individual rights interpretation emerged and, for the first time, the question of gun rights emerged as a contentious issue in American politics. While this was partly due to the Civil Rights Movement and the articulation of numerous individual rights claims, it was primarily the result of politically motivated gun rights activists who organized a

[2] Lucilius A. Emery, "The Constitutional Right to Keep and Bear Arms," *Harvard Law Review* 28 (1914-1915): 473-477.

focused legal campaign to change the traditional interpretation of the Second Amendment. The "New Standard Model" of legal scholarship overturned the collective rights theory with an individual rights argument that challenged the historical meaning of the Second Amendment.[3] The common theme, hence the "new standard" of scholarly consensus, rested on the argument that the traditional interpretation of the Founders' intent was mistaken: the Second Amendment was not designed to protect a collective right (of the states or the people, depending on the historical moment) but guaranteed a sweeping individual right to own and carry weapons. Arguments about the "correct" interpretation of the Second Amendment – whether it protected the collective right of the people to keep and bear arms or secured an individual right to self-defense – remained largely an academic debate until it became a key political issue in the 1970s, as disagreement about the constitutional interpretation of the Second Amendment began to influence partisan positions on gun regulation, escalating the question of gun rights to the national stage. The chapters ahead will demonstrate that these shifts in interpretative thinking reshaped how the issue of gun rights is debated in American politics, providing political actors with competing constitutional justifications to make claims about the scope of gun control.

The Intellectual Inquiry

This dissertation addresses the question of how the issue of gun rights is debated and resolved in American politics. Using the lens of American political development, critical junctures will be identified to show that shifting interpretations of the Second Amendment have led to the transformation of the politics of gun control, including policy changes and partisan realignment, ultimately resulting in the increasingly polarized debate about the role of guns in

[3] Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment," *Tennessee Law Review* 62 (1995): 461-511.

America. Further, this dissertation argues that while the Supreme Court has been integral to framing the right to keep and bear arms, changes outside of the courts have been more influential to the question of gun rights and the constitutional parameters of gun regulation, including the evolution of the state militia system, the federalization of gun policy, and the rise of the gun rights movement. These developments reflect broader shifts in American politics; as the meaning of the Second Amendment has changed over time, so have its politics, particularly changing patterns of federalism that have limited states from regulating guns according to their own interests. Positions on gun control often (but not always) align with the competing interpretations of the Second Amendment: those who understand the Second Amendment to protect the collective right of the people tend to favor more gun control while those who interpret the Second Amendment to guarantee an individual right advocate less regulation. This has not always been the case, however; prior to the 1960s, gun legislation was conducted mostly at the state level, widely accepted as part of the state's regulatory police powers, and minimally debated in national politics as a contentious issue. Thus, accounting for historical shifts in thinking about the Second Amendment will explain how it has become one of the most polarizing issues in American politics – not only in relation to gun control, but to shifting patterns of federalism – and how the balance between of gun rights and gun control can be resolved.

In assessing competing claims as to how the Second Amendment shapes the debate about guns in America, this dissertation will provide an account of the Second Amendment's political development and its interpretation as a civic, state, collective, and individual right, and how these shifts in interpreting the right to keep and bear arms have changed the way competing claims of gun rights and gun control are reconciled in American politics. Based on political, historical, and

legal research, the evidence is sufficiently compelling to support the collectivist reading of the Second Amendment rather than the individual rights interpretation. In other words, the Second Amendment was intended to protect the states from federal encroachment by guaranteeing their right to arm their militias – not to grant an individual right – a position that was subsequently maintained by the courts until the Supreme Court's landmark ruling in *District of Columbia v. Heller* (2008). This premise underscores the whole of this dissertation, which will demonstrate how the collectivist interpretation remains valid even without the existence of the state militia system, and why maintaining this position is still relevant when the Supreme Court has clearly ruled in favor of the individual rights interpretation. Defending the collectivist interpretation of the Second Amendment, however, is only the first step in resolving its constitutional meaning with the larger issue of gun rights. While the Supreme Court's ruling in *Heller* has often been described as a distinct political win for the gun rights movement, it left open crucial political and regulatory questions that remain unsettled, including the constitutional permissibility of gun control measures and the proper balance between state and federal authority in establishing those parameters.

Framing the Question

There are two considerations that frame the discussion of the political development of the Second Amendment and the broader question of how the issue of gun rights is debated and reconciled in American politics. First, regardless of the current individualist interpretation of the right to bear arms, the language itself – including specific mention of a *well regulated Militia* – is still present in the federal Constitution and must be respected as constitutionally sacrosanct. Strictly speaking, the Second Amendment could be rendered extraneous to contemporary American politics – a historical anachronism – because its prefatory phrase, "a well regulated

Militia," no longer exists. On one hand, without a state militia system, the Second Amendment could be considered irrelevant to American politics: neither the states nor the people have a claim to the right to bear arms without a militia. On the other hand, without the limitations of a state militia system, the Second Amendment could be read to grant a broad individual right to keep and bear arms that excludes the states from their traditional role in regulating firearms. Both scenarios present challenges to the established interpretation of the Second Amendment, as well as to the balance of power between the states and the federal government in regulating gun rights. Clarifying its meaning is essential to resolving the issue of gun rights in American politics, including what the Second Amendment means without a militia, the role of the states retain in regulating firearms, and how this affects the broader debate about gun rights.

The second consideration to frame the debate about gun rights is that, in contrast to the existing text, the federal government has made clear its position that the Second Amendment protects an individual right to armed self-defense. In 2004, the Department of Justice Office of Legal Counsel issued a memo declaring: "The Second Amendment secures a right of individuals generally, not the right of the State or a right restricted to persons serving in the militia."[4] The Supreme Court affirmed this interpretation in its ruling *District of Columbia v. Heller* (2008), asserting that the Second Amendment guaranteed the individual right to bear arms for personal self-defense – a position well outside the bounds of its traditional interpretation – but now firmly entrenched constitutional law. In the post-*Heller* political climate, it would be reasonable to assume that the Second Amendment's meaning is clear and its politics well-defined: the Supreme Court established in *Heller* the individual right to keep a weapon in one's home for

[4] John Ashcroft, "Memorandum to All United States' Attorneys re: *United States v. Emerson*, November 9, 2001." See also John Ashcroft, "Whether the Second Amendment Secures an Individual Right," *Opinions of the Office of Legal Counsel* 28 (2004): 128-129.

self-defense; the political issue at stake is the scope of gun control, with disagreement over regulation divided along ideological lines.

But its meaning is decidedly *not* clear, and the debate over gun rights has only intensified as political actors have taken surprising and unexpected positions to justify their arguments. *Heller* overturned two centuries of jurisprudence that interpreted the Second Amendment to protect the collective right of the people to keep and bear arms under the auspices of a state-regulated militia; the modern individualist argument advanced by the Supreme Court conflicts with historical evidence and legal precedent, resulting in the intense and often bitter debate about the "correct" understanding of the Second Amendment and how it influences the proper scope of gun regulation. Further, political concerns extend beyond gun control to include critical issues of federalism and the ability of the states to regulate firearms within their boundaries. This dissertation argues that despite the Supreme Court's ruling that the Second Amendment protects an individual right to keep and bear arms, the collectivist position is the most historically valid and should underscore the debate about gun rights to allow the states to regulate firearms accordingly. Further, it is developments outside of the courts that help to explain the rise of gun rights as a salient political issue, including the increased role of the federal government in regulating rights; the rise of political polarization; and the importance of cultural issues to partisan politics, especially the distinct ethos of "gun culture" that has rendered gun rights groups so effective in achieving their political objectives. While this dissertation includes a detailed narrative of the legal developments that ultimately resulted in *Heller* – and, more relevant to the broader theme of federalism, the subsequent ruling in *McDonald v. Chicago* (2010) which incorporated the Second Amendment against the states – it is changes outside of the courts that offer more compelling insights to the evolving debate about guns in American politics.

The Contribution to the Body of Knowledge

Second Amendment literature is vast, but its scope is relatively narrow. Much of the existing scholarship is incomplete, either focusing too narrowly on a specific time period to justify a particular interpretation of the Second Amendment, or taking historical sources out of context to defend arguments about the proper scope of gun control. For example, scholars on both sides of the debate tend to rely heavily on the Founding era to support their position, using historical evidence from this period to make claims about how the Second Amendment was historically understood and how it should be applied to the modern politics of gun control. Such scholarship provides valuable insight into the origins of the Second Amendment, but does not account for why its interpretation changed over subsequent decades and how it is relevant to the current debate about gun rights.

Answering the question of how the issue of gun rights is debated and resolved in American politics contributes to the broader disciple of political science by satisfying a chasm in the current literature, diverging from existing scholarship in both structure and theme. In terms of structure, this dissertation uses the lens of American political development to account for how competing positions on gun rights have evolved over time. The debate about guns has been approached in many different ways – for example, policy analysis has evaluated gun control measures; the National Rifle Association has been studied as an interest group; and legal scholars have debated at length about the competing interpretations of the Second Amendment – but the issue of guns in American politics has not been subject to a detailed account that uses both political and historical developments to explain how the institutions of American politics and shifts in governing authority have changed over time, and how these changes have influenced the politics of gun control. According to political scientists Karen Orren and Stephen Skowronek,

political development refers to "a durable shift in governing authority," meaning "a change in the locus or direction of control, resulting in a new distribution of authority among persons or organizations within the polity at large or between them and their counterparts outside."[5] By combining the political with the historical, American political development focuses on critical junctures over time, accounting for changes in political authority, through what processes, and to what ends. The Second Amendment has received much attention (particularly in law reviews) but has not received such a comprehensive treatment. This approach is highly applicable to the Second Amendment because the right to keep and bear arms has become such a contentious issue in broader claims about individual rights – and who maintains the political authority to define the scope of those rights. Applying this method also situates the Second Amendment with other major changes in American politics, including the growing role of the federal government; the increase in polarization and the importance of cultural issues to partisan politics; and the rise of the gun rights movement.

Further, this dissertation is concerned with issues of federalism as an underlying theme implicit to the debate about guns, both historically and in contemporary politics. If guns are a particularly divisive issue in American politics, it is a result not only of competing positions on gun control, but also reflects deeply held beliefs about the proper role of the federal government in regulating rights, a position that has not received as much attention as it should in connection to the politics of gun control. While the theme of federalism is present in much of the existing Second Amendment literature, it is often considered only in terms of the drafting and ratification of the federal Constitution rather than how it applies to current American politics. The Bill of

[5] Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York, NY: Cambridge University Press, 2004), 123.

Rights was a concession to Anti-Federalist concerns that the Constitution was neither sufficiently limited nor federal; among the amendments, the Second Amendment was unique because it rested on the premise of a specific institution of federalism: the state militia system. Historically, the Second Amendment was part of a broader debate about the constitutional balance between the states and the federal government in arming the militia. In contemporary American politics, the issue of gun rights should be understood not only as a debate about the scope of gun control, but how regulatory authority is balanced between the states and the federal government.

A Note on Methods

This dissertation began with a simple question: why does the Second Amendment, so brief and awkwardly phrased, arouse such impassioned debate about guns? From this initial query followed a host of historical questions, including the origins of the right to keep and bear arms in the United States; how the understanding of this right changed over time; and how these historical developments influenced the debate about guns in contemporary American politics. As a starting point, the rich body of secondary sources on the history of the Second Amendment provided background and insight into the right to keep and bear arms and the role of guns as American politics evolved over time. This general overview of scholarly work led to the observation that certain pieces of primary evidence often overlapped in the literature, with sources referenced repeatedly, but to defend different arguments. (For example, political scientist Robert J. Spitzer, historian Saul Cornell, legal scholar Patrick J. Charles, and gun rights activist Stephen P. Halbrook all cite Anti-Federalist Patrick Henry's speech at the Virginia ratification convention – "The great object is, that every man be armed…every one who is able may have a gun" – to justify very different conclusions about the right to bear arms at the Founding.) This led to a detailed examination of the most frequently cited primary sources in

order to determine the full context of the references, as well as to look for new sources that may have been overlooked. Thanks to a treasure trove of digital archives, these sources were largely accessible online, a technological advantage that greatly assisted the research process, most of which was conducted during the Covid-19 pandemic that limited access to physical archives. (In the interest of full transparency and academic integrity, primary sources that were not confirmed independently have been attributed to the secondary source in which they were referenced.) As a result, numerous primary sources – including newspapers, pamphlets, popular magazines, legal and historical journals, and personal correspondence – provided perspective on the right to keep and bear arms throughout American political history.

As well, many primary government documents were also consulted, including early state constitutions, records and commentary from the Constitutional Convention, briefs from state legislatures regarding gun regulation, and relevant court cases. Different interpretations of the right to keep and bear arms at the state level were of particular interest because there is a relatively small body of primary evidence regarding the Second Amendment at the federal level: the Second Amendment itself; the Militia Clause of the Constitution (Article I, section 8); eleven acts of federal gun legislation; and nine Supreme Court cases. Forty-four state constitutions include provisions regarding the right to bear arms, which were analyzed to demonstrate how the right to bear arms varied from state to state. From there, state gun regulations, both historic and current, were studied and, finally, relevant state court cases were considered. The goal of this analysis was to determine if and when historical changes at the state level affected the thinking about and application of the Second Amendment at the federal level and, further, how these changes eventually influenced the debate about gun rights in contemporary American politics.

Also, because many of the government documents have been referenced in the existing literature, analyzing these sources was an important step to determine the validity of the current scholarship and to identify topics that have been overlooked. For example, certain state constitutions have been frequently cited by authors of the New Standard Model literature to make an "originalist" argument for the individual right to bear arms. Often these documents are taken out of context, however, or not considered in their entirety or in relation to other state provisions from the same time period, and needed to be revisited with a more objective lens. The Pennsylvania Declaration of Rights (1776), for instance, claims that "the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they should not be kept up." The Pennsylvania state constitution, adopted in 1790, reads simply that "the right of the citizens to bear arms, in defence of themselves and the State, shall not be questioned." Proponents of the individual rights theory argue that such state provisions, without reference to militias, provide clear evidence for an early understanding of a broad individual right to bear arms. But other state constitutions from the same time frame articulate a different kind of right that emphasizes the collective body of the people, and are often ignored in the individualist literature. For example, North Carolina's constitution (1776) declares: "That the people have a right to bear arms, for the defence of the State; and as standing armies, in time of peace, are dangerous to liberty, they ought not be kept up." Further, Virginia's constitution (1776) makes specific mention of the militia: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty." Finally, Massachusetts's state constitution (1780) reads: "The people have a right to keep and bear arms for the common defense. And, as, in time of peace, armies are

dangerous to liberty, they ought not to be maintained without the consent of the legislature." Read together, these examples have one thing in common: the people must be guaranteed the right to bear arms to protect their state from standing armies. Aside from that, however, they offer different interpretations of the right to bear arms, varying in terms of common defense, self-defense, and the role of the militia. In sum, revisiting these primary documents provided not only historical background, but helped to evaluate the existing literature from a more objective perspective.

Following initial research, it was clear that three contextual developments required greater study to explain the political development of the Second Amendment and the politics of gun rights: the transformation of the militia system; developments in gun technology; and the rise of the gun rights movement. These themes animate the full scope of this dissertation, and are also key factors in accounting for the changing patterns of federalism that have affected the states' ability to balance gun rights with gun regulation. First, an institutional history of the militia system was conducted, consisting of research into early state militia provisions and practices as well as federal legislation, including the Calling Forth Act (1792); the Uniform Militia Act (1792); the Militia Act (1903); and the National Defense Act (1916). Also, key state and federal court cases were analyzed to determine how the courts interpreted the right to bear arms in the context of the militia tradition (including *Bliss v. Commonwealth* (1822); *Aymette v. State* (1840); *State v. Buzzard* (1842); *Nunn v. Georgia* (1846); *Hill v. State* (1874); *Salina v. Blaksley* (1905); *Houston v. Moore* (1820); *U.S. v. Cruikshank* (1876); *Presser v. State of Illinois* (1886); *Miller v. Texas* (1894); and *U.S v. Miller* (1939)) and why these cases are still relevant following the drastic legal shift in *Heller*. Finally, a detailed study of the history of the National Guard and its role in American political life was conducted.

Second, changes in the technological development of weapons were examined. At the time of the Founding, the notion of an armed citizenry poised to resist a tyrannical central government was fundamental to the concept of the right to bear arms. But as the technology of weapons changed, so did the locus of tyranny: a government possessing the weapons of modern warfare (such as military-grade machine guns, tanks, and nuclear weapons) would hardly be thwarted by a local militia of armed citizens wielding long-barreled hunting flintlocks. Thus the right to bear arms, in the context of modern weapons, could be understood not as a protection of oneself and one's neighbors from the tyranny of oppressive government, but as a means to individual self-defense against criminal threat. To track changes in weaponry over time, historical research was conducted on types of weapons commonly held over the course of American history; how patterns of ownership and access changed over time; and how the technological innovations of modern weapons influenced the interpretation of the Second Amendment and the evolving debate about gun rights in American politics.

Finally, a detailed study of the gun rights movement was conducted. The purpose of this analysis was to position the politics of the Second Amendment within the context of modern rights claims: the gun rights movement is a relatively recent political phenomenon, but its impact on contemporary American politics cannot be overstated. Central to this inquiry was the history of the National Rifle Association; how and when they and other gun rights groups became politically powerful; the connection between gun rights as a mobilizing political issue and the realignment of the Republican Party; and how their funding of much of the New Standard Model literature influenced the changing politics of the Second Amendment. Also considered were recent court cases (including *U.S. v. Emerson* (2001); *District of Columbia v. Heller* (2008); and *McDonald v. City of Chicago* (2010)) that gun rights advocates have claimed as wins in their

fight to vindicate the individual rights model. The gun rights movement has been particularly successful in persuading the courts to validate its position, recently reiterated in *New York State Rifle & Pistol Association v. Bruen* (2022). Despite these landmark rulings, however, the issue of gun rights in American politics remains an unsettled question, suggesting that the Supreme Court's stance on the Second Amendment may not be as politically relevant as other factors in accounting for the increasingly polarized debate about guns.

Looking Ahead

To answer the question of how the issue of gun rights is debated and resolved in American politics, this dissertation is structured to identify critical junctures over time when shifting interpretations of the Second Amendment have changed the politics of gun control, beginning in the Colonial era and moving forward through the Revolutionary War; the nation's early years; the Civil War and Reconstruction; the transformative twentieth century; the modern rights revolution; and concluding with the politics of guns in current times. Chapter One focuses on the historical and intellectual origins of the right to bear arms that influenced early state constitutions and gun regulations. Chapters Two through Four discuss the nature of arms-bearing during the Revolutionary era; the debates surrounding the drafting and ratification of the Second Amendment; and the crucial role of the state militia system to early notions of republican government. Subsequent chapters provide an account of the changing nature of the state militia system, ultimately resulting in the formation of the National Guard; early legal interpretations of the right to bear arms, including whether the Second Amendment applied to the states; and a comprehensive account of federal gun legislation. From there, Chapter Seven discusses the development of collective rights theory and the Supreme Court's traditional position on the Second Amendment. Chapters Eight and Nine turn to the rise of the gun rights movement; the

establishment of the National Rifle Organization as a pivotal political actor and how the Second Amendment was used to advance its cause; changes to federal gun legislation; and the development of individual rights theory and its influence on the partisan debate about gun control, including a literature review to account for the New Standard Model of Second Amendment scholarship. Chapter Ten analyzes the milestone decisions *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010), as well as a detailed account of the process of incorporating the Second Amendment against the states, arguing that even though the Supreme Court established the individual right to keep and bear arms, its traditional interpretation as a states' right must be maintained in the interest of federalism. The Conclusion further advances this assertation, contending that the intense debate about gun rights in American politics could be tempered by allowing the states greater latitude to regulate both gun control *and* gun rights. Under a federalized system of well-regulated liberty that emphasizes state autonomy, the states would be free to either limit or expand the right to keep and bear arms based on the demands of their constituents, which balances the politics of gun control with the constitutional parameters of the Second Amendment. Gun rights is a deeply divisive and highly partisan issue, resulting more often than not in a stalemate rather than in effective policy. Accounting for the political development of the Second Amendment – from a civic duty to an individual right – is crucial to understanding not only the politics of gun control, but the changing nature of rights and broader patterns of federalism in American politics.

Chapter One:

The Intellectual Origins of the Right to Bear Arms

The debate about gun rights in modern American politics emphasizes the importance of individual rights, a perspective that is drastically different from how the right to keep and bear arms was understood in the nascent days of the new republic. In early America, the notion of arms-bearing as a protected individual right was not a widespread concept, neither in theory nor in practice. Rather, reflecting the influences of British constitutional thought and classical political philosophy, colonists bore arms as part of their civic duty to protect the common good, relying on armed citizen militias to mitigate the dangers of standing armies. The armed citizen-soldier was duty-bound to contribute to the greater goals of political society through service in the local militia; civic virtue, not individual rights, provided the justification to bear arms. The citizen militia would become a central institution for the new representative government established in the colonies, essential to achieving the colonial ideal of a political system of well-regulated liberty. Examining the intellectual origins of the right to keep and bear arms provides the historical context to understand philosophical justifications for the early militia system, and how this system would later come to frame the Second Amendment. Further, it demonstrates that while early concepts of arms-bearing differed from contemporary interpretations of the right to keep and bear arms, the fundamental premise of the current debate about gun rights in American politics – the protection of individual liberties – has deep roots in American political thought.

British Constitutional Heritage and the Right to Bear Arms

The experiment of American republican government was both radical, in its departure from established norms, and traditional, in its commitment to deeply entrenched British political

values. The colonists' early grievances against the King of England rested on the claim that their rights as British subjects had been violated, including the right to bear arms as established by the British Declaration of Rights (1689). Arms-bearing in colonial America was at once reminiscent of the colonists' English heritage but also distinctly new in practice, as settlers forged their own path toward a new political order. Early Americans were influenced by the legacy of English constitutional thought, philosophical theories of the time, and their understanding of rights as British subjects prior to the Revolutionary War. This rich historical and intellectual context provided the foundation for what would become the distinctly American concept of the right to bear arms in the colonies under a new republican order, or what John Adams referred to as "a government of laws, and not of men."[6]

England, similar to other countries in Europe, adhered to a model of arms-bearing that reflected the democratic traditions of antiquity that relied on an armed populace to guard the state from threat; for much of England's history, an armed citizenry was essential to public order, including domestic policing and military defense. Still, monarchical governments were well aware of the risks of arming laypeople and preferred professional armies of noblemen or mercenary soldiers to universal militias. French political theorist Jean Bodin, widely read at the time, articulated the dangers of citizen militias under certain political regimes: arming the general population in a pure democracy, ruled by equality, could be politically advantageous, but arming the masses in a hierarchical monarchy may well be dangerous if the people used their authority – as those who controlled the means of force – against their superiors in popular insurrections. Governments were either supported or threatened by an armed citizenry,

[6] Charles Francis Adams, ed., *The Works of John Adams*, volume IV (Boston, MA: Little, Brown and Co., 1856), 437.

depending on their political sympathies. Once the masses were armed, however, Bodin cautioned that the people's newfound power would encourage rebellion:

> The slave asks only to be unfettered; once removed from his shackles, he desires liberty; once freed, he asks the right of the bourgeois; from bourgeois, he wishes to be made a magistrate; when he is in the highest rank of magistrates, he wants to be king; once king, he wants to be the only king; finally, he wants to be God.[7]

According to Bodin, the majority of citizens should be barred from bearing arms and, instead, an elite force of nobility was the best protection to guard the state. With monarchial governments dominant in Europe, however, firearms became more widespread as the general populace feared disarmament, leading to questions as to which groups, and under what circumstances, should be armed and the constitutional parameters of that right.

King James II was cognizant of the danger of an armed populace when he consolidated power and established the authority of the Catholic Church in England, maintaining a large standing army to defend his position. Further, he established the Test Act of 1673, which excluded from military service anyone who refused to take the sacraments of the Catholic Church, effectively elevating Catholics to commanding officers and barring Protestants from serving in the army.[8] Dissenters issued a list of grievances against the Crown, including the accusation that King James II "did endeavor to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom." He did this "by causing several good subjects, being protestants, to be disarmed, at the same time the papists were both armed and employed, contrary to the law."[9] The complaint was twofold: Protestants were disarmed at the same time that Catholics were actively being armed, meaning that Protestants had neither the means to protect

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[7] Jean Bodin, *Les Six Livres de la République*, M.J. Toley, trans. (Oxford, UK: Basil Blackwell, 1967), 755.
[8] G.M. Trevelyan, *The English Revolution, 1688-1689* (Oxford, UK: Oxford University Press, 1965), 57-62.
[9] Richard L. Perry and John C. Cooper, eds., *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and the Bill of Rights* (Chicago, IL: American Bar Foundation, 1960), 245.

themselves nor to fully engage in political society as members of the military. Once William of Orange triumphed over King James II, Parliament issued a Declaration of Rights that was later codified as the English Bill of Rights, which included a key provision that asserted the right to bear arms "as allowed by Law."[10] This meant that Protestants could now serve in the military and Parliament would have wide regulatory latitude over arms-bearing.

The British Declaration of Rights (1689) listed grievances against King James II as well as granted English subjects a wide array of political and civil rights. It established a qualified right to armed resistance in Article VII, which guaranteed "that the Subjects which are Protestant may have Arms for the Defence suitable to their Conditions, and as allowed by Law."[11] The law referred to statutes which extended the ownership of firearms not just to Protestants, but to the nobility, wealthy landowners, and militia members exercising their duties. While Article VII broadened the right to bear arms in England, it was not without limitations; as one member of Parliament cautioned, arming the populace could be dangerous, as it "savours of the politics to arm the mob, which…is not very safe for government."[12] Parliament retained regulatory powers that severely curtailed who could legally bear arms, and for what purposes. The laws included the conditions for tracking and confiscating weapons, hunting restrictions, and prohibitions such as wandering about armed at night. Specifically, "game laws" stipulated who had the right to hunt and where, regulated poaching, and determined what sort of game could be taken. Game laws often did not deal with firearms directly, but effectively allowed the government to determine which groups (primarily the nobility) were permitted to possess weapons. As legal

[10] The Bill of Rights, 1689, 1 W.&M. 2, c. 2, art. VII (England).
[11] Ibid.
[12] Ibid.

theorist Sir William Blackstone observed, game laws helped in "the prevention of popular insurrections and resistance to government by disarming the bulk of the people."[13]

While the British Declaration of Rights established the right to bear arms, it was still subject to broad regulation: the careful balance between state sovereignty and an armed populace meant that the rights of British subjects were ordered by common law and regulated through political processes. Further, owning guns was relatively rare in England in the seventeenth century, not simply because of Parliament's regulations, but because of the availability and cost of firearms, as well as their size and awkwardness to operate.[14] Still, while mainly limited to the upper classes, the right to bear arms was considered fundamental to the British people, and understood as the esteemed duty of a virtuous subject to protect the common good. Writing some hundred years (1780) after the English Bill of Rights had been established, the Recorder of London (legal advisor to the mayor and council) explained:

> The right of his Majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses, *individually*, *may*, and in many cases *must*, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of the judicial decisions and ancient acts of parliament, as well as by reason and common sense.[15]

[13] Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, volume II, William Draper Lewis, ed. (Philadelphia, PA: Rees Welsch & Co., 1902), 412.
[14] C.G. Cruickshank, *Elizabeth's Army*, 2nd edition (Oxford, UK: Clarendon Press, 1966), 115.
[15] William Blizard, *Desultory Reflections on Police* (London, UK: Baker and Galabin, 1785), 59-60.

Thus the colonists' British constitutional heritage inculcated the belief that they had both a duty and a right to bear arms, a fundamental principle that would be essential to the early militia system.

The British Tradition of Arms-Bearing in the Colonies

Given recent events in British politics, however, the colonists brought to America a distrust of standing armies and organized police forces, relying instead on an armed citizenry as the best means to assure public order and safety. Colonists arrived in the New World equipped with privately owned weapons and were often required to bear arms to assist in law enforcement and the common defense. Local laws usually stipulated that residents provide their own weapons and ammunition, though many towns offered space and supplies for target practice to ensure that the people had basic proficiency in operating a gun.[16] The colonists later came to rely on formally trained select militias, rather than the universal militia of the general populace; still, the idea of an armed citizenry remained an essential republican principle that shaped the early militia system. The distinction between the general and select militias reflected the British practice of regulating arms-bearing along class and religious lines, which effectively meant only the upper classes were armed. Still, King James II was met with resistance when he attempted to disarm Protestants and the subsequent Declaration of Rights instilled in the British, and later the colonists, the idea that the right to bear arms was a fundamental political liberty of all citizens. [17]

[16] Robert J. Cottrol, ed. *Gun Control and the Constitution* (New York, NY: Garland Publishing, Inc., 1994), xii.
[17] For an overview of the Founders' understanding of the English Declaration of Rights and its influence on their novel form of government, see Lois G. Schwoerer, *The Declaration of Rights: 1689* (Baltimore, MD: Johns Hopkins University Press, 1981). Schwoerer traces the political and legal history of British militias, arguing that the right to bear arms was essentially a parliamentary right necessary to the arming of militias. As well, see Joyce Lee Malcolm, *To Keep and Bear Arms* (Cambridge, MA: Harvard University Press, 1996). Malcolm also provides a detailed history of the British militia, its arms-bearing tradition, and how this context influenced the Framers' conception of the right to bear arms, but departs from Schwoerer by using British history to defend an individualist interpretation of bearing arms in early America.

Further, the concept of the right to bear arms for American colonists was influenced not only by recent experiences in England, but also existing legal theory: arms-bearing was a fundamental right but also limited by law. The early colonies were founded on charters granted by the King of England that established self-governing republics based on British political and legal models, and key to those early charters were provisions securing the rights of Englishmen residing in the new colonies. For example, the Virginia royal charter declared:

> Also we do…DECLARE…that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions.[18]

The colonists, despite great distance, retained their liberties as English subjects, including the right to bear arms. Small, local militias of armed citizens were duly organized in the colonies to provide for public safety and defense, quickly becoming key civic institutions as new political structures were established. The notion of the virtuous citizen was a powerful political ideal in the early days of the colonies, and an underlying organizational principle to citizen militias: American colonists held fast to the image of an independent, armed citizen ready to defend his liberties, as well as committed to greater good of political society through militia service. The myth of the armed citizen was a common theme of political theorists of the time, who often referred to antiquity and the greatness of Rome and Athens, where free men provided the best defense against tyranny. For example, historian Edward Gibbon wrote in his history of Rome, "A martial nobility and stubborn commons, possessed of arms, tenacious of property, and

[18] Virginia Charter (1606) in Francis Thorpe, ed. *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the States, Territories, and Colonies* (Washington, DC: Government Printing Office, 1909), 3788.

collected into constitutional assemblies, form the only balance capable of preserving a free constitution against enterprises of an aspiring prince."[19] Revolutionary American Joel Barlow pushed the ideal of the armed citizen further: "The people will be universally armed; they will assume those weapons for security, which the art of war has invented for destruction."[20] Still, the archetype of the armed citizen was not based on that citizen's individual right to keep and bear arms, but understood in the context of the British model of arms-bearing as a communal duty – an acquiescence to the reining political order rather than an individual right.

Grievances Against England

Even as tensions escalated between the colonists and the Crown, early Americans continued to defend their rights as British subjects rather than as American citizens. The colonists claimed their rights were being violated in their capacity as British subjects, and argued that their liberties were protected by the British Constitution and the charter of rights and liberties guaranteed by Parliament. The Continental Congress justified its grievances against England by referencing the British Declaration of Rights. As James Otis, legal theorist and Son of Liberty, explained:

> That the colonists, black and white, born here, are free born British subjects, and entitled to all the essential civil rights of such, is a truth not only manifest from the provincial charters, from the principles of the common law, and the acts of parliament, but from the British constitution…with a professed design to secure the liberties of all the subjects to all generations.[21]

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[19] Edward Gibbon, *The Decline and Fall of the Roman Empire*, volume I (New York, NY: The Modern Library, 1932), 53.
[20] Joel Barlow, *Advice to the Privileged Orders in the Several States of Europe Resulting from the Necessity and Propriety of a General Revolution in the Principle of Government* (Ithaca, NY: Cornell University Press, 1956), 45.
[21] James Otis, "The Rights of the British Colonies Asserted and Proved," in Bernard Bailyn, ed., *Pamphlets of the American Revolution 1750-1776*, volume I (Cambridge, MA: Harvard University Press, 1965), 428.

One of the most important grievances against England was the oppression of the people in the form of standing armies. The colonists responded with outrage to the arrival of British troops in 1768 and the use of military rule by royal governors: "A military force, if posted among the People, without their express consent, is itself one of the greatest grievances, and threatens the total subversion of a free constitution."[22] The colonists claimed the unchecked nature of military power was subordinating civil power, specifically the presence of a standing army in peacetime; the quartering soldiers in private homes; the court-martialing of civilians; the use of mercenary soldiers; and the seizure of militia arms. Colonist John Dickinson claimed in 1768 that the "designs of the crown" were "backed by a standing army"[23] and fellow colonist James Wilson feared the King's "Plan of reducing the colonies to slavery."[24] Samuel Adams was deeply suspicious of standing armies and warned the people must safeguard their liberties:

> A standing Army, however necessary it may be at some times, is always dangerous to the Liberties of the People. Soldiers are apt to consider themselves a Body distinct from the rest of the Citizens. They have their Arms always in their hands…they soon become attached to their officers and disposed to yield implicit obedience to their Commands. Such a power should be watched with a jealous Eye.[25]

Because a standing army was so dangerous to the liberties of the people, the colonists considered it a fundamental principle of republican government that military power should be subordinated to and controlled by the independent civil authority of the people.[26]

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[22] Massachusetts House of Representatives (7 April 1770) cited in Lawrence Delbert Cress, *Citizens in Arms* (Chapel Hill, NC: University of North Carolina Press, 1982), 34.
[23] John Dickinson, *Letters from a Farmer in Pennsylvania, Letter IX* in Leonard Kriegel, ed., *Essential Works of the Founding Fathers* (New York, NY: Bantam Books, 1964), 65, 68.
[24] James Wilson, *An Address to the Inhabitants of the Colonies, 13 February 1766* in Kriegel, ed., *Essential Works of the Founding Fathers*, 120.
[25] Letter from Samuel Adams to Joseph Warren (7 January 1776) in Richard H. Kohn, ed., *The Eagle and the Sword: The Beginnings of the Military Establishment in America*, volume II (New York, NY: Free Press, 1975), 122.
[26] For a full catalog of the colonists' grievances against the King, see "Suffolk Resolves," addressed to General Gage (6 September 1774) in Worthington Chauncey Ford, ed., *Journals of the Continental Congress* 34 (Washington, D.C.: Library of Congress, 1904).

Republican Political Theory: The Foundation of the Militia Ideal

The colonists' struggle to assert their liberties against British oppression, including the right to bear arms in citizen militias, was not only a political conflict, but a battle of ideas: the intellectual context from which the colonial understanding of the right to bear arms emerged was grounded in classic republican political theory, and these concepts would later shape how the colonial militias were structured. The colonists were deeply influenced by traditional political theorists such as Niccolò Machiavelli, as well as contemporary liberal European thinkers including Jean Bodin, James Harrington, James Burgh, John Trenchard, Walter Moyle, and most importantly, John Locke and Sir William Blackstone. For the colonists, the right to bear arms was closely linked to the republican principle that a virtuous citizenry was essential to defend itself from the dangers of governmental tyranny.

The central problem of arms-bearing and republican theory, however, was the tension between personal rights and communal responsibilities. The very existence of the colonies depended on civic virtue and good character, as only a virtuous citizenry could self-govern in a republican order that valued both personal liberty and mutual obligations to fellow citizens. For the colonists, this paradox was mitigated by the belief that the virtuous – and armed – citizen must serve in the militia, fully engaged in and committed to the public life of the republic. The virtuous citizen was thus duty-bound to serve on behalf of the republic as an citizen-soldier, bearing arms in defense of the common good. This right was understood as a collective endeavor of the people to defend their liberties, but also relied on the individual commitment of citizens to fulfill their duty to the state. Further, the colonists were deeply suspicious of standing armies, viewing them as the ultimate expression of governmental tyranny and, instead, strongly

favored citizen militias: if republics were meant to protect liberty from despotic governments, they must defend themselves with militias of virtuous citizens as opposed to standing armies.

The Armed Citizen

Of course, not every colonial militiaman was versed in liberal political philosophy and bore his weapon as a symbol of republican virtue. But political theory in the colonies was vital to the development of key political principles – including the importance of a virtuous and armed citizenry, the notion of the right to bear arms as a duty to defend the common good, and the protection of liberties from a tyrannical government – ideas that would later underscore early American constitutional thought and how the right to bear arms would be protected in the colonies. For example, Niccolò Machiavelli's classic political treatise, *The Art of War*, was deeply influential to the colonists' early conception of the right to bear arms, particularly the view that it was the duty of each citizen to participate in military service for the common defense of the state. According to Machiavelli, a properly governed commonwealth "should take care that this art of war should be practiced in time of peace only as an exercise, and in time of war, only out of necessity and for the acquisition of glory." Further, "if any citizen has another end or design in following this profession [of war], he is not a good man; if any commonwealth acts otherwise, it is not well governed."[27] The people, through the institution of the militia, possessed both a duty and a right to bear arms to protect the state from external and internal threats: "The danger posed by manipulating demagogues, ambitious rulers, and foreign invaders to free institutions required the vigilance of citizen-soldiers cognizant of the common good."[28]

[27] Niccolò Machiavelli, *The Art of War* (Indianapolis, IN: Bobbs-Merrill: 1965), 14-15.
[28] Ibid., 19.

Machiavelli's political theory was fundamental to the colonists' conception of the citizen soldier: the best defense against tyranny was the economic independence of the citizen and his willingness to take up arms as a citizen-solider to ensure the continuation of the republic. For Machiavelli, there was a clear link between arms and civic virtue, which evolved into a political theory that connected an armed citizenry with civil rights; arms were a symbol for freedom and to allow some – but not all – citizens to possess weapons was a flagrant denial of rights. Arms played a distinct role in republican society, and political conditions should be organized to allow for all citizens, morally upright and economically independent, to be armed in the pursuit in the common defense of the republic. Machiavelli wrote, "When they depend on their own and are able to use force, then it is that they are rarely in peril…once they have overcome them [dangers with virtue]…they remain powerful, secure, honored, and happy."[29] For the colonists, arms, both literally and symbolically, were a guarantee of liberty.

Not all political theorists agreed, however, with the notion of an armed citizenry. For example, French political philosopher Jean Bodin (1530-1596) followed Machiavelli's reasoning but qualified his conclusion based on the structure of government: some political arrangements should fear arming the people while others required an armed populace. Bodin concurred with Machiavelli that authority resided with those who controlled the means of force – the people with guns had ultimate power. Monarchies and popular governments, because of their different political organizations, varied in their allowance of arms-bearing, with monarchies distrustful of arming the people while popular governments encouraged widespread access to weapons. In theory, the general people in a democratic political order should be armed to prevent tyranny and check governmental corruption; in contrast, if the common people in a monarchy were armed, "it

[29] Niccolò Machiavelli, *The Prince*, 2nd edition (Chicago, IL: University of Chicago Press, 1998), 24-25.

is to be feared they will attempt to change the state, to have a part in the government."[30] Further, "the most usuall way to prevent sedition, is to take away the subjects armes."[31] The colonists would soon find themselves in this very predicament as tensions with England escalated.

James Harrington, a seventeenth century British republican theorist widely read in the revolutionary era, was also influenced by Machiavelli. He believed that republics depended on a virtuous citizenry: the virtuous citizen must possess private arms and be willing to use them in defense of the state. Harrington departed from Machiavelli, however, in linking landownership with civic virtue, a notion that would be critical to the colonists' ideal of the armed yeoman committed to the common good through militia service. For Harrington, the virtuous citizen was independent, in possession of his own land, and ready to use arms to defend himself, his property, and the state. The armed landowner embodied civic virtue, possessing the traits of the ideal republican citizen – autonomous and self-reliant – but also willing to defend himself and his neighbor against tyranny through participation in the polity and military service.[32] For Harrington, a republic was the most stable form of government because its citizens, "being all soldiers or trained up unto their arms, which they use not for the defense of slavery but of liberty," would be the best defense of liberty: "Men accustomed to their arms and their liberties will never endure the yoke."[33] For Harrington, an armed citizenry was only acceptable if committed to public defense and the common good, and the citizen militia should serve two purposes: defending the state, but also protecting the people from centralized governmental power.

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[30] Jean Bodin, *The Six Bookes of a Commonweale*, Kenneth Douglas McRae, ed. (Cambridge, MA: Harvard University Press, 1962), 605.
[31] Ibid., 542.
[32] James Harrington, *The Prerogative of Popular Government* in John Pocock, ed., *The Political Works of James Harrington* (Cambridge, UK: Cambridge University Press, 1977), 383-400.
[33] Ibid., 442.

The Danger of Standing Armies

Beyond the classical ideals of civic virtue and the citizen-soldier as fundamental to a system of well-regulated liberty, the colonists were also influenced by contemporary beliefs in the dangers of standing armies and the superiority of the citizen militia. For example, political philosopher James Burgh (1714-1775) opposed the standing army and supported the citizen militia, arguing that "those, who have the command of the arms in a country, says Aristotle, are the master of the state, and have it in their power to make what revolutions they please."[34] Further, governments would act differently depending on the origin of power: "There is no end to observations on the difference between the measures likely to be pursued by a minister backed by a standing *army*, and those of a court awed by the fear of an *armed people*."[35] Not only was the citizen militia the best means to prevent governmental tyranny, but it was also essential to the good character of the people. Civic virtue was closely tied to the people's willingness and ability to take up arms in defense of the state and themselves, and essential to the protection of individual liberties:

> No kingdom can be secured otherwise than by arming the people. The possession of arms is the distinction between a freeman and a slave. He, who has nothing, and who himself belongs to another, must be defended by him, whose property he is, and needs no arms. But he, who thinks he is his own master, and has what he can call his own, ought to have arms to defend himself, and what he possesses; else he lives precariously, and at discretion.[36]

According to Burgh, England, in its preference for standing armies and mercenary soldiers, had lost the connection between arms and independence: "The common people of England…having been long used to pay an army for fighting for them, had at this time forgot all the military

[34] James Burgh, *Political Disquisitions: Or, an Enquiry into Public Errors, Defects, and Abuses*, volume II (London, UK: E. and C. Dilly, 1774-1775), 345.
[35] Ibid., 476.
[36] Ibid., 390.

virtues of their ancestors."[37] If Britain had lost her way, Burgh saw hope in the colonies, where self-sufficient, armed yeoman were committed to protecting their liberties as well as the common good.

Further, republican theorists John Trenchard and Walter Moyle were influential to the new republican political order emerging in the colonies. Both were suspicious of standing armies, claiming that bearing arms was the only way for the people to protect their liberties: "A general Exercise of the best of their People in the use of Arms, was the only bulwark of their Liberties; this was reckon'd the surest way to preserve them both at home and abroad…" Since bearing arms was crucial to maintaining liberty, self-governed republics required citizens to serve in their local militias rather than rely on standing armies: "The Sword and Sovereignty always march hand in hand, and therefore they trained their own citizens and the Territories about them perpetually in Arms, and their whole Commonwealths by this means because so many several formed Militias." The people, through organized militias, must be able to defend themselves from domestic attacks, foreign threats, and "the Ambition of their Governours, and to fight for what's their own."[38] The influence of such theorists was apparent as the colonists shifted the conception of themselves from British subjects to American citizens, evident in language emerging from the Continental Congress in 1775. Colonists were committed to both the love of liberty and the use of arms, a theme that would resonate in American politics in the future: "On the sword, therefore, we are compelled to rely for protection. Should victory declare

[37] Burgh, *Political Disquisitions: Or, an Enquiry into Public Errors, Defects, and Abuses*, 415.
[38] John Trenchard and Walter Moyle, *An Argument Shewing, That a Standing Army is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy* (London, UK: s.n., 1697), 7.

in your favour, yet men trained to arms from their infancy, and animated by the love of liberty, will afford neither a cheap nor easy conquest."[39]

Arms-Bearing, Natural Rights, and Well-Regulated Liberty

As the colonies moved closer to their break with England, the writings of John Locke and Sir William Blackstone became increasingly important to the development of early American political thought, eventually influencing the structure of the colonial militia system. The colonists were familiar with and guided by the political philosophy of Locke, who was widely read and commented on in the Colonial era. Locke's *Two Treatises on Government* (1690) denounced absolute monarchies in favor of constitutional monarchies: the monarch retained power, but ultimate authority rested in the people. Locke's argument was commonly viewed as a justification of the Glorious Revolution (1688-1689), which overthrew King James II, replaced him with a new monarch, and established the authority of the Parliament. Beyond his argument for the sovereignty of the people, Locke's natural rights theory was deeply influential to the colonists, the premise which stated that, upon entering a political association, certain natural rights were relinquished in the name of political order. In the case of bearing arms, Lockean theory held that one surrendered the right to use force against others in favor of the protection of political society. Rational people would set aside certain individual rights in order to form a society that benefited the common good, thus resistance became collective in nature: if the people must battle tyranny, they would do it collectively through established political institutions. Locke envisioned a liberal constitutional government in which liberty was preserved without violent revolution: "Men uniting into politick societies, have resigned up to the publick the disposing of all their Force, so that they cannot employ it against any Fellow-

[39] *Journals of Congress*, volume I (Philadelphia, PA: Library of Congress, 1800-1801), 148.

Citizen, any farther than the law of the Country directs."[40] Locke's natural right theory influenced many of the nation's Founders, including Thomas Jefferson, James Madison, John Adams, and George Mason. Addressing the Assembly of Virginia in 1774, Jefferson spoke in Lockean tones, claiming the early colonists "possessed a right which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establish new societies."[41]

Further, the writings of British legal theorist Sir William Blackstone shaped the colonists' early understanding of the right to bear arms and how this right would be organized into military service. Blackstone's *Commentaries on the Laws of England* (1765 – 1769) was a primary resource for teaching eighteenth century lawyers the foundations of common law, and was also widely read by scholars and political leaders. Blackstone set out a theory of limitations within the British constitutional system intended to protect the people from tyranny, and his scheme of absolute versus auxiliary rights would later be critical to determining the scope of the right to bear arms in the colonies. Blackstone discussed the right to bear arms in his treatise "Of the Absolute Rights of Individuals," defining the right to bear arms as "the natural right of resistance and self-preservation, when the sanctions of society and laws are found to be insufficient to restrain the violence of oppression."[42] Blackstone organized absolute rights into three categories: life, liberty, and property. The right to life was tantamount to personal safety, which "consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation;" the right to liberty included personal liberty and freedom of

[40] John Locke, *An Essay Concerning Human Understanding*, volume II (Oxford, UK: Oxford University Press, 1965), 353.
[41] Thomas Jefferson, *A Summary View of the Rights of British America* (Williamsburg, VA: Clementina Rind, 1774).
[42] Sir William Blackstone, *Commentaries on the Laws of England*, volume I (London, UK: Clarendon Press, 1765), 139.

movement; and the right to property was the right to protecting private property from arbitrary confiscation. Despite the name "absolute," these rights could still be regulated for the purposes of safety and the common good. Blackstone agreed with Locke that while people were free "to act as [they] think fit, without any restraint or control, unless by the law of nature," it was not in their best interest to do so, as self-preservation was best assured in political society.[43] Blackstone wrote:

> For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security for individuals in any of the enjoyments of life.[44]

The right to bear arms was an auxiliary right, hence subordinate to the three absolute rights. According to Blackstone, auxiliary rights were "declared, ascertained, and protected by the dead letter of the laws" meant "to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."[45] Blackstone presented a theory of five auxiliary rights, the first three encompassing the political institutions of England: Parliament, the monarch, and courts of law. If the government failed to provide democratic means to settle injustices, the people possessed the fourth auxiliary right – the right to petition for the "redress of grievances." Finally, if all political means failed, the people could invoke their fifth auxiliary right, the right to bear arms:

> The fifth and last auxiliary right of the subject…is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law…[this right] is indeed a public allowance, under due restrictions, of the natural right of resistance and

[43] Blackstone, *Commentaries on the Laws of England*, volume I, 143-144.
[44] Ibid.
[45] Ibid., 136.

> self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[46]

Still, Blackstone emphasized that the call to arms was justifiable only if all other political options have been exhausted:

> And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled in the first place to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defence.[47]

For the colonists, the fifth auxiliary right was properly understood in the context of lawful resistance. The right to bear arms established in the British Declaration of Rights was meant to secure for the communal body of the people the means to resist tyranny, but regulation was implicit: the people had the right to bear arms, but it would be regulated through their parliamentary representatives, similar to British game laws.[48]

The right to bear arms was distinctly political for Blackstone; similar to the right of assembly, bearing arms was a right held by all subjects and linked to particular civic functions, specifically communal protection and the prevention of political oppression. According to Blackstone, the right to bear arms was different from the individual right to self-defense: while the fifth auxiliary right was a political right, held by the collective body of the people for a common political purpose, self-defense was a natural right codified and protected under common rather than constitutional law. That said, the right to self-defense was not unlimited; under

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[46] Blackstone, *Commentaries on the Laws of England*, volume I, 139.
[47] Ibid., 140.
[48] Blackstone differentiated between the right to bear arms and the right to hunt, the latter being a natural right, but one that could be regulated by the state. Many game laws from the time were not merely intended to regulate hunting practices or protect animals but meant to disarm the common people. These laws sought to prevent "popular insurrections and resistance to the government, by disarming the bulk of the people: which last is a reason oftener meant, than avowed, by the makers of forest or game laws…"[48] See Sir William Blackstone, *Commentaries on the Laws of England With an Introduction by A.W. Brian Simpson*, volume II (Chicago, IL: University of Chicago, 1979), 411-412.

British common law, one was first obliged to flee, not to fight: "The law required that the person who kills another in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant."[49] Thus Blackstone established the difference between the right of a soldier and the right of an individual; the fifth auxiliary right meant soldiers in wartime must stand their ground and fight while citizens had a legal obligation to first retreat when under attack. The distinction applied to the state as well: the government could force citizens to bear arms for the public defense but could not compel citizens to arm themselves in their own defense. These ideas would become central to the construction of the new republican order in the colonies and later influence the structure of the militia system.

Transforming Theory into Practice: Establishing the Citizen Militia

The writings of such republican political theorists were deeply influential to the colonial ideal of well-regulated liberty, a fundamental principle that would shape the new political institutions established in the colonies. For Blackstone, duties and rights coexisted: "The rights of persons that are commanded to be observed by the municipal law are of two sorts: first, such as are due from each citizen, which are usually called civil duties; and, secondly, such as belong to him, which is the more popular acceptation of rights."[50] The political system was intended to regulate civic duties, defining the parameters of what was expected of a virtuous citizen, as well as protecting his rights. For Blackstone, well-regulated liberty was "no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick."[51] The colonists were committed to the notion of well-regulated

[49] Blackstone, *Commentaries on the Laws of England*, volume IV, 184.
[50] Blackstone, *Commentaries on the Laws of England*, volume I, 199.
[51] Ibid., 121.

liberty and its connection to a effective political and legal structures. For example, minister John Zubly gave a sermon at the Provincial Congress of Georgia in 1775, claiming that "well regulated liberty of individuals is the natural offspring of laws, which prudentially regulated the rights of whole communities." Further, "all liberty which is not regulated by law is a delusive phantom."[52] Fundamental to the notion of well-regulated liberty was the duty of citizens to serve in the militia: the colonial image of the armed citizen embodied the ideal manifestation of civic duty under a well-regulated political order, as each citizen-solider had the obligation to protect both the common good and individual liberties through participation in the local militia.

The paradox of republican political theory, however, was that republics relied on the virtue of citizens, requiring them to set aside their private interests for the common good – but most self-interested citizens would not act virtuously unless the political order required them to do so. Or, as Alexander Hamilton opined in *Federalist 15*, "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint." Further, if citizens "adhere to the design of national government…we must extend the authority of the union to the persons of the citizens…the only proper objects of government."[53] One such political institution that encouraged civic virtue was a well-regulated citizen militia. If political authority depended on those who controlled the means of force, then the militia represented ultimate civil authority, being of both the state and of the people: the state called forth and trained the militia, but it was compromised of, and gained its legitimacy from, the people themselves as a protection from governmental tyranny. The strength of the militia

[52] John J. Zubly, *The Law of Liberty: A Sermon on American Affairs, Preached at the Opening of the Provincial Congress of Georgia* (Philadelphia, PA: Henry Miller, 1775).
[53] Alexander Hamilton, *Federalist 15* in George W. Carey and James McClellan, eds. *The Federalist* (Indianapolis, IN: The Liberty Fund, 2001), 72.

rested on the integrity of the people, thus the militia must be universal and committed to the public good; citizens were duty-bound to protect the state, but they were also protecting their own interests and those of their neighbors, who shared the similar desire to establish a political order to secure their own safety, property, and rights.

Thus the intellectual origins of the right to keep and bear arms, particularly the notion of well-regulated liberty through militia service, laid the foundation for the new structure of government established in the colonies, or what founder Roger Sherman referred to as "a commonwealth without a king."[54] Ideally, the citizen-soldier was a politically engaged member of republican society whose interests aligned with the common good – directly involved in the practice of self-government through his voting capacity, in control of his independent resources as a freeholder, and committed to the common good through militia service. (That said, while arms-bearing was a fundamental political ideal linked to civic virtue, in practical terms it was often burdensome to the individual; citizens had to set aside individual interests to provide for the common good, leaving their homes and businesses for training duties that were often inconvenient or dangerous.) Still, serving alongside his fellow citizen, militia duty reinforced the republican principles of civic virtue and self-government; further, bearing arms in the service of the militia rendered citizens more independent from their government, with a healthy suspicion of their governing authorities.

Militia authority was not, however, unlimited, but meant to align with proper republican purposes: force was considered a last resort; armed resistance was only permissible after all available political processes had failed. The people must act as a united front, not expressing mere discontent with existing leaders, but reacting against true tyranny. For example, once the

[54] Charles Francis Adams, ed., *The Works of John Adams*, volume IV, 437.

colonists renounced England for denying their rights, simple rebellion was not sufficient; they needed to construct a new form of republican government, complete with institutions and processes, which would provide for democratic self-rule. It was at this juncture – independence from Great Britain – that the rich body of political philosophy that influenced colonial thinking moved beyond theory and provided guiding political principles for an innovative form of government, "a separate and independent nation which rejected even a limited monarch, preferring an elected executive who served a fixed term. And the nation we formed was the United States of America, not the United States of Locke."[55] This historical and intellectual context provided the basis for a new republican political order, including the establishment of the militia system and what would become the distinctly American right to keep and bear arms in the colonies.

[55] Robert J. Spitzer, *Guns Across America* (New York, NY: Oxford University Press, 2015), 15.

Chapter Two:

Toward a Revolution

Supporters of the gun rights movement often invoke America's revolutionary heritage to justify their argument for a sweeping right to keep and bear arms. The image of the armed colonist is a powerful symbol that reflects cherished beliefs about the nation's history – particularly the commitment to protecting individual liberties from tyranny – ideals which continue to underscore the modern debate about gun rights in American politics. While there is truth to this historical narrative, arms-bearing in the Revolutionary era was not simply a matter of defending the individual rights of the colonists from Britain, but also included the collective political duty of citizens to serve in their local militia to provide for the common good. The militia system would become a fundamental political institution in the young republic, vital to securing a well-regulated democratic order and crucial to the right to bear arms established in early state constitutions, which would come to influence the eventual wording of the Second Amendment. The debate about gun rights in current American politics often overlooks the historical implications of the traditional militia system, which established the right to keep and bear arms within the context of local political institutions. Revisiting this critical juncture in American political development serves as a reminder that individual liberty has meant different things given historical and political circumstances, and that protecting individual rights is often secured through a broader obligation to the common good.

The novel experiment of American government rested on philosophical traditions that emphasized civil authority and the sovereignty of the people, and bearing arms in colonial militias was both an expression of democratic self-government as well as a defense against the tyranny of the royal government and the oppression of military rule. Citizen-soldiers, called to

bear arms against threats posed by the British standing army, fulfilled their duty to defend their rights as a collective body of citizens as well as to secure their individual liberties. The militia not only assured protection from threat, but provided the organizational structure to integrate citizens into the new American political order; by serving in their local militia, the people shared mutual obligations to each other – and to the state – through common duties and political commitments.

The colonists were victorious in the American Revolution for many reasons, including the use of European warfare techniques, aid from France, and Britain's struggle to maintain soldiers and supplies from abroad.[56] Most importantly, however, was the vast number of American militiamen and regular soldiers well trained in arms. One of the lasting legacies of the Revolutionary War was the codification of the ideal of the citizen-soldier, rendering the militia tradition in the colonies significant both practically and symbolically. Practically, it was less expensive to maintain local militias rather than a professional standing army; further, it was advantageous in rural and unsettled areas to rely upon local militias because they could be quickly mustered. Symbolically, the militia was a key political institution of republican government, as colonists were duty-bound to serve in the militia to protect their liberties from threats of tyranny. Thus the early conception the right to keep and bear arms embodied both pragmatism and idealism: the virtuous citizenry was expected to uphold the political principles of the republic while bearing arms under the auspices of a well-regulated militia, committed to

[56] For comprehensive accounts of the role of the militia during the Revolutionary War, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1992); Daniel J. Boorstin, *The Americans: The Colonial Experience* (New York, NY: Random House, 1958); Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (Chapel Hill, NC: University of North Carolina Press, 1982); Don Higginbotham, *The War of American Independence, Military Attitudes, Policies, and Practices 1763-1789* (Norwalk, CT: Easton Press, 1983); Edmund S. Morgan, *Inventing the People, The Rise of Popular Sovereignty in England and America* (New York, NY: W.W. Norton & Co., 1988); and Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, NC: University of North Carolina Press, 1969).

the ideals of liberal government as well as providing protection from tyranny. These themes – an armed populace, civil authority over military rule, and the dangers of standing armies – would lay the framework for the right to bear arms established in early state constitutions, which emphasized the importance of the citizen militia in providing for the common defense and securing the rights of the people.

Grievances against Britain

The increased presence of British soldiers in the colonies led to intensified debate about the best arrangement of military organization, including the dangers of standing armies, the role of the citizen-soldier, and the right to bear arms in the colonial militia. Recent events in England, including the Glorious Revolution, raised fears that professional standing armies would tyrannize the people and deny them their liberties, including the right to keep and bear arms. A seventeenth century pamphlet cautioned against such tyranny and urged the people to organize into militias:

> The only Ancient and true Strength of a Nation is the Legal Militia…the Militia must, and can never otherwise be than for English Liberty, because else it doth destroy itself; but a standing Force can be for nothing but [royal] Prerogative, by whom it hath its idle living and Subsistence.[57]

In the colonies, the citizen-soldier stood in contrast to the professional soldier: rather than a hired mercenary obeying commands of the state, the ideal citizen-soldier was an independent property owner committed to the common defense, ready to perform his civic duty through militia service. As moral philosopher Richard Price commented, "Free States ought to be bodies of armed *citizens*, well regulated, and well disciplined, and always ready to turn out, when properly called upon, to execute the laws, to quell riots, and to keep the peace. Such…are the citizens of

[57] *A Letter from a Parliament Man to His Friend* (1675) in *State Tracks: Being a Collection of Several Treatises Relating to Government, Privately Printed in the Reign of King Charles II* (London, UK, n.p. 1693).

America."[58] Or, as revolutionary American Josiah Quincy claimed, the people must be organized into armed militias because "supreme power is ever possessed by those who have arms in their hands and are disciplined to use them."[59]

Prior to The Seven Years' War, the only military force present in the colonies were local militias. But with the arrival of regular British troops in 1763, many colonists began to question the authority of the King, claiming that given their distance and autonomy from England, it was their prerogative to govern the colonies according to their own interests. With intensified British aggression – including the threat of disarmament; the quartering troops in private homes; the suspension of local charters and laws; and the eventual imposition of martial law – the colonists became increasingly critical of the King's far-flung power. The Fairfax County Resolves (1774) captured the colonial mood: "*Resolved*, That it is our greatest wish and inclination, as well as interest, to continue our connection with, and dependence upon, the *British* Government; but though we are its subjects, we will use every means which Heaven hath given us to prevent our becoming its slaves."[60]

The First Continental Congress passed a list of resolutions in 1774 that established the rights of the colonists – including life, liberty, and property – asserting that they were entitled to all rights and liberties of Englishmen, having not relinquished them by emigrating to the colonies. Further, the colonists believed the foundation of free government rested on the right of the people to participate in the legislative process. But as the colonies were not represented in the British legislature, "they are entitled to a free and exclusive power of legislation in their

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[58] Richard Price, *Observations on the Importance of the American Revolution, and the Means of Making it a Benefit to the World* (London, UK: T. Cadell, 1874), 16.
[59] Josiah Quincy, Jr., *Observations on the Act of Parliament, Commonly Called the Boston Port Bill; with Thoughts on Civil Society and Standing Armies* in Josiah Quincy, Jr., *Memoir of the Life of Josiah Quincy Jun*. (Boston, MA: Cummings, Hill, & Co., 1825), 428.
[60] George Washington and George Masson, *Fairfax County Resolves* (17 July 1774).

several provincial legislatures, where their right of representation can alone be preserved…"[61] After the Continental Congress declared these general resolutions, they catalogued a list of rights that had been violated by King George III, including the imposition of a standing army: "*Resolved*…9. That the keeping a Standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against the law."[62]

The Threat of Disarmament

In response to the threat of the standing British army, revolutionary leaders called citizens to consolidate arms as a preemptive defense; given that all available political processes had failed, the people should arm themselves as a protection from a tyrannical government in accordance with Sir William Blackstone's theory of auxiliary rights. *A Journal of the Times*, widely reprinted in newspapers throughout the Revolutionary era, hastened the people arm themselves:

> Calling upon the inhabitants to provide themselves with arms for their defence, was a measure as *prudent* as it was *legal*…It is a natural right which the people have reserved for themselves, confirmed by the [British] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.[63]

In opposition, British General Thomas Gage launched a series of measures to disarm the people of Boston, including forbidding residents from leaving the city if they refused to relinquish their arms. (While many refused, others did willingly comply: according to records from the time, "on the 27th of April the people delivered to the selectman 1778 fire-arms [muskets], 634 pistols,

[61] W.C. Ford, ed., *Journals of the Constitutional Congress* (Washington, DC: Library of Congress, 1904-1907), 67-68.
[62] Ibid.
[63] *A Journal of the Times* (1768-1769) cited in Oliver Morton Dickerson, *Boston Under Military Rule as Revealed in A Journal of the Times* (Boston, MA: Chapman and Grimes, 1936), 79.

973 bayonets, and 38 blunderbusses…").[64] Enraged at such an egregious abuse of liberties, John Hancock and Thomas Jefferson penned their *Declaration of the Causes and Necessity of Taking up Arms*, which demanded that residents be allowed to deposit weapons with their own magistrates "…that they might be preserved for their owners, [rather than] be seized by a body of soldiers…"[65]

By 1768, tensions were running high in Boston as armed mobs of colonists and British soldiers roamed the streets, coming to violence when John Hancock's boat *Liberty* was seized by customs officials for failure to pay taxes on its cargo. Royal Governor Francis Bernard proposed the quartering of soldiers to restore order, a plan that was vehemently rejected by Bostonians; still, two regiments of British soldiers swiftly moved from Halifax toward Boston. Citizens were incensed that Britain threatened to impose their standing army upon their territories, and – even more loathsome – to disarm colonial militias, a punishment most dangerous to the people's liberties. Once British troops landed in Boston, they banned the importation of military supplies (gunpowder most notable) and ordered the people to turn in their weapons. The Boston Town Council responded by calling the people to arms in accordance with militia law, referring to Article VII of the British Declaration of Rights:

> By an Act of Parliament, of the first King *William* and Queen *Mary*, it is declared, That the subjects being Protestants, may have arms for their Defence: It is the Opinion of this Town, That the said Declaration is founded in Nature, Reason, and sound Policy, and is well adapted for the necessary Defence of the Community.
> As by a good and wholesome [militia] Law of this Province, every listed Soldier and other Householder…shall always be provided with a well fix'd Firelock, Musket,

[64] Richard Frothingham, *History of the Siege of Boston, and of the Battles of Lexington, Concord, and Bunker Hill* (Boston, MA: Little, Brown & Co., 1903), 95.
[65] John Hancock and Thomas Jefferson, The *Declaration of the Causes and Necessity of Taking up Arms* (6 July 1775).

> Accoutrements and Ammunition…that those of the said Inhabitants, who may at present be unprovided, be and hereby are Required duly to observe the said Law at this Time.[66]

While the Council's measure was rejected by the towns of Massachusetts as too extreme, the Council went on to propose more moderate measures. They provided a petition to Parliament "for the redress of their grievances" but reassured that "no irregular steps should be taken by the people…all constitutional and prudential methods should closely be attended."[67] Meanwhile, Royal Governor Bernard investigated the Boston Town Council for treason while in England, King George III addressed Parliament, accusing the Boston colonists of "measures subversive to the constitution, and attended with circumstances that might manifest a disposition to throw off their dependence on Great Britain."[68]

Organized Resistance

In response, Samuel Adams published a heated reaction in the *Boston Gazette* to address the tensions. Writing on 30 January 1769, Adams was incredulous that the democratic debates of the Boston Town Council were being misrepresented as treason and sedition, as neither the King nor Parliament could prove any treasonous activity. Further, if the Council could be considered treasonous, so too could Parliament for sending its army to be quartered in Boston against its own subjects. Most compelling was Adams' argument that the Council's resolves were in accordance with both the British Declaration of Rights and Massachusetts common law:

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[66] *At the Meeting of the Freeholders and Other Inhabitants of the Town of Boston, Legally Qualified and Warn'd in Public Town Meeting Assembled* (Boston, MA, n.p., 1768). The Boston Council was referring to the 1693 Militia Act, as well as current militia laws that required "every listed Soldier and other Householder…shall always be provided with a well fix'd Firelock, Musket…or other good Fire Arms to the Satisfaction of the Commission Officers of the Company." See "An Act for Regulating the Militia (1693)," *The Charter Granted by Their Majesties King William and Queen Mary, To the Inhabitants of the Province of Massachusetts Bay in New England* (Boston, MA: S. Kneeland, 1759).

[67] *The London Magazine or Gentleman's Monthly Intelligencer* 37 (1768): 690-694.

[68] William Cobbett, ed., *Cobbett's Parliamentary History of England*, volume XVI (London, UK, R. Bagshaw, 1813), 469.

> For it is certainly beyond human art and sophistry to prove that British subjects, to whom the privilege of possessing arms is expressly recognized by the [British] Bill of Rights, and, who live in a province where the [militia] law requires them to be equip'd with arms, etc. are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs.[69]

According to Adams, the Boston Council was justified in their actions, invoking Sir William Blackstone's fifth auxiliary right in response to the threat of their liberties by the British standing army. Referring to Blackstone, Adams wrote:

> How little do those persons attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to provide themselves with arms for their defence at any time; but more especially, when they had reason to fear, there would be a necessity of the means of self-preservation against the violence of oppression.[70]

Adams understood Article VII of the British Declaration of Rights, read in the context of Blackstone's fifth auxiliary right – that "having arms for their defense, suitable to their condition and degree, and such as are allowed by law…[this right] is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation" when all other means had failed – protected the right of the people to arm the militia.[71] Because Article VII granted British subjects, through Parliament, the right to arm their militias, the people were protected from a tyrannical sovereign; since the people had democratic recourse through Parliament, the people could be summoned into a militia "suitable to their conditions and as allowed by law" to uphold constitutional liberties threatened by the tyrannous standing army. [72] For Adams and the colonists, the right to bear arms was understood as the power to defend the state in accordance

[69] Samuel Adams, "Article Signed 'Shippen'" in Harry Alonzo Cushing, ed., *The Writings of Samuel Adams 1764-1769*, volume I (New York, NY: Octagon Books, 1968), 299.
[70] Harry Alonzo Cushing, ed., *The Writings of Samuel Adams 1764-1769*, volume I, 317-318.
[71] Sir William Blackstone, *Commentaries on the Laws of England*, volume I (London, UK: Clarendon Press, 1765), 139.
[72] Ibid.

with existing militia laws, which the colonists were duty-bound to uphold. Further, militia service fulfilled a distinctly political function: bearing arms did not mean simply wielding a musket, but was also an expression of organized resistance against the tyranny of the British standing army. Thus the right to bear arms was considered a constitutional check against governmental oppression and allowed the people to protect their liberties through common militia service.

Bearing Arms and the Protection of Liberty

For revolutionary colonists, there was a fundamental link between arms and liberty, as bearing arms was essential to the protection of the people's freedom from tyranny. Political theorist Algernon Sidney's *Discourses Concerning Government*, widely read at the time, praised the popular sovereignty of ancient Rome, which he claimed rested on an armed citizenry to defend the people's liberty against Caesar's corrupt standing army: "In a popular or mixed Government every man is concerned…[and] the body of the People is the public defense, and every many is armed and disciplined."[73] Further, "peace is seldom made, and never kept, unless the Subject retain such a Power in his hands, as may oblive the Prince to stand to what is agreed."[74] The colonists upheld the republican principles of individual liberty and protected rights as fundamental to the new structure of American government, and were prepared to defend their autonomy against British tyranny as a collective body of armed, well-organized, and disciplined militiamen. A "British Bostonian" wrote:

> Americans will not submit *to be* SLAVES, they know how to use a gun, and military art, as well as any of his Majesty's troops at St. James's, and where his Majesty has one soldier, who art in general the refuse of the earth, America can produce fifty, free men,

[73] Algernon Sidney, *Discourses Concerning Government* (Indianapolis, IN: Liberty Fund, 1996), 157.
[74] Ibid., 173.

> and all volunteers, and raise a more potent army of men in three weeks, than England can in three years.[75]

In response to British aggression, Massachusetts colonists began to consolidate arms and muster their militias. Boston selectmen ordered that arms be cleaned and publicly displayed in the city hall, while other towns sent representatives to Boston to address the crisis as they began to organize their own militias, secure arms and ammunition, and assemble supplies. Further, local towns petitioned the royal governor with their grievances and demanded the protection of their rights as English subjects, resting on three constitutional principles based on British legal tradition: the tyranny of standing armies; the rule of militia law; and the people's right to bear arms. According to this logic, standing armies established without the consent of the people was considered an act of tyranny, thus the people had the right to bear arms for their common defense as understood by the provision in the English Declaration of Rights that allowed "for the necessary Defense of the Community." Further, colonial militia law (a "wholesome law of the Province") required that each household procure its own firearms to fulfill their duty of serving in the militia to provide for the common defense, understood within the structures established by both British legal traditions and early American common laws.

For the colonists, one of the most grievous denials of political liberty was the oppression of military rule. The unchecked authority of military force subordinated the civil power of the people through the practices of court-martialing civilians, the use of mercenary soldiers, and – particularly abhorrent – the seizure of militia arms. Colonists were unequivocal in their criticism of England: John Dickinson wrote in 1768 that the "designs of the crown" were "backed by a standing army" and feared that the colonists' liberties were being violated through the garrison of

[75] Reverend John Allen, *An Oration, upon the Beauties of Liberty, or the Essential Rights of Americans* (Boston, MA, n.p., 1773).

soldiers in private homes and the use of military rule by royal governors.[76] Thomas Jefferson claimed the King had employed "large bodies of armed forces" to advance his "arbitrary measures"; and James Wilson feared the King's "plan of reducing the colonies to slavery."[77] "A Carolinian" warned that military rule was not only dangerous to the fundamental liberties of the colonists, but effectively prevented the people from exercising their right to self-government:

> With all the plausible Pretenses to Protection and Defense, a standing Army is the most dangerous Enemy to the Liberties of a Nation that can be thought of…it is much better, with a well regulated Militia, to run the Risk of a foreign Invasion, than, with a Standing Army, to run the Risk of Slavery…when an Army is sent to enforce Laws, it is always an Evidence that either the Law makers are conscious that they had no clear and indisputable Right to make those Laws, or that they are bad and oppressive. Wherever the People themselves have had a Hand in making Laws, according to the first Principles of our constitution, there is no Danger of Non-submission, nor can there be Need of an Army to enforce them.[78]

Thomas Jefferson's language on the Declaration of Independence would later echo such themes: the Declaration's founding principles required "the harmonizing sentiments of the day, whether expressed in conversations, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc."[79]

Establishing Citizen Militias

Colonists feared that the troops recently arrived in Boston – and quartered in their private houses – would be a source of oppression rather than provide for their protection; further, they were threatened by British plans to confiscate arms and limit access to gunpowder stores. The antidote to the visceral antipathy toward standing armies was the colonists' deep attachment to

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[76] John Dickinson, *Letters from a Farmer in Pennsylvania, Letter IX*, in Leonard Kriegel, ed., *Essential Works of the Founding Fathers* (New York, NY: Bantam, 1964), 65, 68.
[77] Thomas Jefferson, *A Summary View of the Rights of British America* in Kriegel, ed., *Essential Works of the Founding Fathers*, 97, 111; James Wilson, *An Address to the Inhabitants of the Colonies* (13 February 1766) in Kriegel, ed., *Essential Works of the Founding Fathers*, 114, 120.
[78] A Carolinian, "From the *South Carolina Gazette*, of August 23, 1774," *Virginia Gazette* (Richmond, VA), 27 September 1774.
[79] John Dewey, ed., *The Living Thoughts of Thomas Jefferson* (New York, NY: Premier/Fawcett, 1963), 42.

the militia system, which rested on the belief that arms should only be entrusted to those who had the people's best interest and safety in mind, such as landowners organized into a militia. Local militias were considered the best protection of the people's civil and political rights, and any attempt by the Crown to weaken the militias was regarded as a direct attack on liberty. For the colonists, the local militia provided the surest defense for the people, rendering standing armies only necessary in exceptionally rare circumstances; a well-regulated militia secured both the people's rights and the protection from threat, allowing citizens to "defend themselves, their lives and properties, and preserve the many invaluable privileges they enjoy under their present happy constitution."[80] As the militia was the best means to defend and protect the colonies, the fear of British disarmament was a grave threat to the experiment of American self-government, and the forthcoming battles of Lexington and Concord would be a direct reaction to the Crown's attempt to undermine the authority of colonial militias by denying them the right to keep and bear arms.

With increased British military aggression, the colonies began to formally establish their militias as sovereign authorities. In Virginia, George Mason and George Washington founded the Fairfax County Militia Association, independent of the royal authority that had "Threat'ned with the Destruction of our Civil-rights and Liberty." According to Mason, "A well regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen…" was required to protect "our ancient Laws & Liberty" from the standing army. Militia members, "recommended to such of the inhabitants of this County as are from sixteen to fifty years of age," were required to "provide themselves with good Firelocks…" and other equipment necessary to defending the

[80] William Smith, ed., *The American Magazine and Monthly Chronicles for the British Colonies: Containing from October 1757 to October 1758*, volume I (Philadelphia, PA: William Bradford, 1758), 95.

colony.[81] Virginia served as an example of militia organization for the other colonies, which quickly began to assemble similar regiments. In Massachusetts, Samuel Adams called for "our Friends to provide themselves without Delay with Arms & Ammunition, get well instructed in the military Art, embody themselves & prepare a complete Set of Rulers that they may be ready in Case they are called to defend themselves against the violent Attacks of Despotism."[82] The Delaware legislature declared that "a well regulated Militia…is the natural strength and stable security of a free Government." In Maryland, a militia "will obviate the pretence of a necessity for taxing us on that account, that is, for defense, and render it unnecessary to keep any Standing Army, (ever dangerous to liberty), in this Province…"[83] With a preliminary militia system now in place, the colonial governments were next tasked with drafting new documents to organize and regulate the nascent military structure.

The Right to Bear Arms in Early State Constitutions

As tensions between England and the colonists continued to escalate, political leaders began preparing formal documents to establish official state governments, most of which favored a militia over a standing army and included a bill of rights. As George Mason articulated in the Virginia Declaration of Rights:

> That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under the strict subordination to, and governed by, the civil power.[84]

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[81] Robert A. Rutland, ed., *The Papers of George Mason, 1725-1792* (Chapel Hill, NC: University of North Carolina Press, 1970), 212-215.
[82] Harry Alonzo Cushing, ed. *The Writings of Samuel Adams*, volume III (New York, NY: Putnam, 1906), 162-163.
[83] Delaware Declaration of Rights (1776); Maryland Declaration of Rights (1776.)
[84] George Mason, "Final Draft of the Virginia Declaration of Rights" (12 June 1776), in Robert A. Rutland, ed., *The Papers of George Mason*, volume I (Chapel Hill NC: University of North Carolina Press, 1970), 286.

Many of the early state documents protected a qualified right to bear arms, and, based on natural rights theory, the right of revolution. As Thomas Jefferson opined, "What country can preserve its liberties if its rulers are not warned from time to time that its people preserve the right of resistance? Let them take arms…the tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants."[85] The colonies varied in their interpretation of the right to bear arms, with Pennsylvania granting an explicit right to bear arms ("the people have a right to bear arms for the defense of themselves and the State") while Delaware and New Hampshire upheld the right *not* to bear arms for religious reasons (but still required citizens to pay for a replacement.) These early documents would lay the foundation for more comprehensive state constitutions following the Revolutionary War. Writing retrospectively in 1787, Senex of Massachusetts provided commentary on the right to bear arms in the state constitution ("the People have a right to keep and bear arms for the common defence"), situating its arms-bearing provision as a reaction against British attempts to disarm the state militia. The "evil intended to be remedied" was that "Great Britain meant to take away their arms" hence "they wisely guarded against it."[86]

Britain's motivation to disarm colonial militias was to deny the people the means of collective self-defense in opposition to the standing army, and from having the political recourse to oppose a tyrannical government. This was not an idle threat, as England had already taken measures to disarm the colonial militia. For example, in Massachusetts, British soldiers entered Williamsburg to remove gunpowder, supplies, and disable the firelocks on muskets stored in the arsenal; later, the Minutemen would confront troops moving to seize weapons in Lexington and

[85] Thomas Jefferson, "Letter to William S. Smith (1787)," in Saul K. Padover, ed., *Thomas Jefferson on Democracy* (New York, NY: D, Appleton Century Crofts, 1939), 20.
[86] Senex, *Cumberland Gazette* (Portland, ME), 12 January 1787.

Concord. Thus early state arms-bearing provisions upheld cherished political values as well as responded to a specific military situation – not just the threat of standing armies in general, but the presence of British standing armies disarming their local militias in particular. The right to bear arms established in early constitutional documents would reflect the colonists' deep commitment to the militia as a vital institution to secure well-regulated liberty, as well as a direct reaction to the active disarmament of local militias.

Independence from Britain

With a revolution imminent, the threat of British oppression converged with the liberal political philosophy so revered by John Adams and other colonists, eventually providing the justification for the Continental Congress to declare its independence from England. In the *Letter to Great Britain* (1775), Congress articulated the themes of self-government and the protection of liberties: "The principles of Self preservation [no] longer permit us to neglect providing a proper defence to prevent the pernicious practices of wicked men and evil Counsellors, alike enemies to the religion, laws, rights, and liberties of England and America."[87] Later, from the letter to the *Inhabitants of the United States*, the Continental Congress claimed it had been "forced to take Arms for self preservation" so to "maintain the Liberty, Religion and property of ourselves."[88] Finally, Thomas Jefferson penned the famous lines of the Declaration of Independence in 1776:

> But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.[89]

[87] *Letters of the Delegates to Congress 1774-1789*, volume I (Washington, DC: Government Printing Office, 1977), 548.
[88] *Letters of the Delegates to Congress 1774-1789*, volume VII (Washington, DC: Government Printing Office, 1981), 144.
[89] Thomas Jefferson et al., *The Declaration of Independence* (4 July 1776).

Grievances listed against the King of England in the Declaration of Independence articulated specific examples of tyrannical military overstep, including the imposition of standing armies in times of peace without consent of the legislatures; the subordination of civil power to the military establishment; the quartering of troops in private homes; and imposing armies of foreign mercenaries to perform "the works of death, desolation and tyranny, already begun with circumstances to Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation."[90] John Hancock later declared that the Declaration of Independence broke "all connection between Great Britain and the American colonies" which now could "declare them free and independent states;" further, the Declaration was to function "as the ground and foundation of a future Government."[91]

After declaring independence from Great Britain, the Continental Congress began drafting the Articles of Confederation. Military powers articulated in the Articles clearly established civil power over military authority: each state would maintain "its sovereignty, freedom, and independence" and Article VI provided that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered;" further, Congress was limited in its powers over the military and could not maintain a standing army without the consent of nine of the thirteen states.[92] Once the Articles were drafted, states received notice and began to compose their own constitutions. Delaware, Maryland, New Hampshire, New Jersey, Pennsylvania, South Carolina, and Virginia held state constitutional conventions in 1776, followed by Georgia, New York, and Vermont in 1777 and Massachusetts in 1780. (Connecticut

[90] Thomas Jefferson et al., *The Declaration of Independence* (4 July 1776).
[91] "Letter from John Hancock, President of Congress, to the New York Convention," (6 July 1776) in Peter Force, ed., *American Archives: Documents of the American Revolution, 1774-1776*, volume I (Washington, D.C.: Peter Force, 1833-1846), 5.
[92] The Articles of Confederation (1781).

and Rhode Island remained outliers, existing under their royal charters until 1818 and 1843, respectively.) The new state documents followed a similar format: they claimed that ultimate political power derived from the people; government should be organized into three branches of government; and a legislature was permitted to pass all laws not in conflict with the constitution. Further, most states included a bill of rights modeled after the English Bill of Rights that limited government power, many of which asserted that rights were negative restrictions on centralized authority rather than a positive grant of rights.[93]

Balancing Authority: The Federal Army and Colonial Militias

With the provisional structure of American government in place, the tension between standing armies and colonial militias was no longer merely a philosophical question, but became a practical domestic concern during the Revolutionary War. The Revolution was fought by fourteen separate military organizations: the Continental Army under the command of George Washington, and the thirteen colonial militias. Washington was critical of militias and preferred a standing army:

> To place any dependence upon Militia is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestick life; unaccustomed to the din of Arms; totally unacquainted with every kind of military skill, which being followed by a want of confidence in themselves, when opposed to Troops regularly train'd, disciplined, and appointed, superior in knowledge and superior in Arms, makes them timid, and ready to fly from their own shadows…

[93] For a comprehensive account of the drafting of the Articles of Confederation, see Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention* (New York, NY: Little Brown & Co., 1986); George William Van Cleve, *We Have Not a Government: The Articles of Confederation and the Road to the Constitution* (Chicago, IL: University of Chicago Press, 2017); and Gordon S. Wood, *Power and Liberty: Constitutionalism in the American Revolution* (Oxford, UK: Oxford University Press, 2021).

> The Jealousies of a standing Army, and the Evils to be apprehended from one, are remote; and, in my judgment, situated and circumstanced as we are, not at all to be dreaded…[94]

Regardless of Washington's criticism, however, the militia ethos was firmly entrenched, both in theory and in practice. Thomas Jefferson, among others, lauded the militia system as critical to victory over England, praising citizen-soldiers for their expert marksmanship: American success could be "ascribed to our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun from his infancy."[95] Despite Jefferson's praise, however, the militia's record during the Revolutionary was mixed. Alexander Hamilton would later reflect:

> I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense…the American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.[96]

Still, even if retrospective accounts demonstrated that the Revolutionary War was, in fact, won by regular American and French soldiers, "the image of the rag-tag, privately equipped militia successfully challenging the British Empire earned an enduring place in American thought and helped shape American political philosophy."[97] As Adam Smith wrote in *Wealth of Nations*, "Men of republican principles have been jealous of a standing army as dangerous to liberty. It certainly is so, wherever the interest of the general and that of the principal officers are not

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[94] John Clement Fitzpatrick, ed., *The Writings of George Washington* (Washington, DC: Government Print Office, 1931-1944), 110-112.
[95] Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York, NY: Viking/Literary Classics of the United States, 1984), 760.
[96] Alexander Hamilton, "Federalist 25," in George W. Carey and James McClellan, eds., *The Federalist* (Indianapolis, IN: The Liberty Fund, 2001), 125.
[97] Robert J. Cottrol, *Gun Control and the Constitution* (New York: Garland Publishing, 1994), xvi.

necessarily connected with the support of the constitution of the state."[98] Regardless of the local militia's achievements on the battlefield, what had once been merely a military requirement – that the people were duty-bound to be armed and organized into militias to provide for the common defense – became a cherished principle in the new republic, and continues to resonate as a powerful political symbol in the current debate about gun rights in American politics.[99]

While the Articles of Confederation provided provisions regulating both national defense and state militias, it did not mention the people's right to bear arms, indicating that citizens were expected to bear arms as part of a well-regulated militia:

> Every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.[100]

In an arrangement that would serve as a precursor to the federal Constitution, the Articles of Confederation required the federal government to raise armed forces, but the colonies were required to muster and train their militias, implicit to which was the keeping and bearing of arms by citizens under the auspices of militia service. As had been the case in earlier state militia mandates, militiamen were often required to provide their own arms (though provisions for public stores meant the colonies could arm their soldiers if needed). Admittedly, the system was

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[98] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Edwin Cannon, ed. (London, UK: Methuen, 1904), 309.

[99] For historical accounts of the colonial militia's performance in the Revolutionary War, as well as other factors that contributed to American success (such as the importance of formally trained American and foreign soldiers; financial and military assistance from France; and flagging British political morale), see Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York, NY: W.W. Norton & Co., 1988); John W. Shy, *A People Numerous and Armed: Reflections on the Military Struggle for American Independence* (London, UK: Oxford University Press, 1976); and Russel S. Weigley, *History of the United States Army* (New York, NY: Macmillan, 1967).

[100] Articles of Confederation (1781).

not always clear in its demarcation of authority; the Continental Congress issued a statement in 1783 to clarify the arrangement:

> …Congress ought not to overlook that of well regulated militia; that as the keeping up such a militia and proper arsenals and magazines by each State…the attention of Congress to this object becomes a constitutional duty; that as great advantages would result from uniformity in this article in each State, and from the militia establishment being as similar as the nature of the case will admit to that of the Continental forces, it will be proper for Congress to adopt and recommend a plan for this purpose.[101]

While the federal government retained authority over general military organization, the states were tasked with regulating, arming, and training their militias, which would include "all the free male inhabitants in each state from 20 to fifty" who must provide their own arms, powder, bullets, and other accouterments and be prepared to muster immediately in times of military threat.[102] The relatively weak nature of the militia system under the Articles indicated a strong role for the states in organizing their militias and determining the scope of the right to keep and bear arms. Thus a "well-regulated militia" in the Revolutionary era was understood to be an independent organization of armed citizens, ready at a moment's notice to muster against a tyrannical standing army. Colonial leaders fully trusted that the newly formed local militias would rise to the occasion and fulfill their civic duty to bear arms; as Samuel Adams explained, "The Militia is composed of free Citizens. There is therefore no Danger of their making use of their Power to the destruction of their own Rights, of suffering others to invade them."[103] In Virginia, Patrick Henry declared that an independent militia "is the natural strength and only security of free government" and that "…three million people, armed in the holy cause of

[101] W.C. Ford, ed., *Journals of the Continental Congress*, 23 October 1783 (Washington, DC: Library of Congress, 1904-1937), 741-742.
[102] Ibid.
[103] Harry Alonzo Cushing, ed. *The Writings of Samuel Adams*, 251.

liberty…are invincible by any force which our enemy can send against us."[104] Lieutenant Colonel Commander Henry Lee wrote in his memoirs that the success of the Revolution depended of the willingness of all citizens to fulfill their duty to assemble into armed militias: "…Every man capable of bearing arms must use them in aid or in opposition to the country of his birth. In the choice to be made, no hesitation existed in the great mass of the people."[105]

With American victory over Great Britain, there was the gradual disbandment of the Continental Army, eventually to be replaced with citizen-soldiers serving in state militias. This was the result of both philosophical ideals (the fear of standing armies; the primacy of the virtuous citizen-soldier) but also due to practical considerations (war debts; cost-efficient local militias). Even George Washington, initially in favor of a small standing army, came to value the state militia system: "Every Citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even of his personal service to the defense of it…[They ought to be] provided with uniform Arms, and [be] so far accustomed to the use of them." The militia would be "the Van and flower of the American forces ever ready for Action and zealous to be employed whenever it may be necessary in the service of their country." [106] Washington had been in the minority in his support of a standing army, as most of the new political leaders opposed any kind of professional military apparatus in fear of federal encroachment against the states. For example, founder Elbridge Gerry opined that state militias would lose their authority with the presence of a federal standing army:

> If we have no standing Army, the Militia, which has ever been the dernier Resort of Liberty, may become respectable, and adequate for our Defence…but if a regular Army

[104] Patrick Henry, "Address to the Second Virginia Convention," in *Journal of Proceedings of Convention Held in Richmond* (Williamsburg, VA: J. Dixon, 1775), 34. Henry's famous "Liberty or Death" speech was also reprinted in the *Virginia Gazette* (1 April 1775) and widely circulated.
[105] Henry Lee, *Memoirs of War in the Southern Department of the United States* (New York, NY: University Publishing Co., 1869), 168.
[106] George Washington, cited in Walter Millis, *Arms and Men* (New York, NY: Putnam, 1956), 38-39.

> is admitted, will not the Militia be neglected, and gradually dwindle into Contempt? and where are we to look for Defence of our Rights and Liberties?[107]

These concerns about federalism would later frame the discussion of the right to bear arms in the upcoming debates about structure of the federal Constitution.

The Foundation of the Second Amendment

Given the modern commitment to individual rights, the Revolutionary era is a notable historical reminder that, while bearing arms was fundamental to militia service, the notion of the individual right to bear arms was not a widespread political concept. Bearing arms under the auspices of militia service, regulated by local authorities, was understood as the requirement of citizens to provide for the common defense, as well as to fulfill their civic duty to the state. The revolutionary American citizen-soldier was familiar with both his musket and what it represented: the tradition of keeping and bearing arms was at once a practical tool of common defense, as well as a symbol of well-regulated liberty rather than a protected individual right. Still, in the interim period between the American triumph over England and the drafting of the federal Constitution, the right to bear arms, and under what framework – a standing army or state militias – became a political issue; those who argued for strong federal authority preferred a standing army while those who favored a weaker central government claimed state militias would provide the best protection of liberties. The themes that would underscore the Constitutional Convention were readily apparent throughout the Revolutionary era – the right of the colonies to defend themselves from tyranny; legislating for the general good and safety; the protection of individual liberties; and balancing the challenges of federalism, or how power

[107] Elbridge Gerry, cited in Don Higginbotham, *The War of American Independence* (New York, NY: Macmillan, 1971), 442.

would be divided between the states and the federal government – issues that, while historical in nature, continue to influence the modern debate about gun rights in American politics.

Central to these concerns was the role of citizens bearing arms in service of their militias, crucial not just for the common defense, but as an essential political institution, bringing localities together on communal muster days as an expression of self-government. The ideal of the citizen militia was powerful, evident in the wording of the early colonial constitutions, particularly the Virginia Declaration of Rights. By the mid-1780s, all thirteen colonies had formal constitutions, seven of which included bills of rights. All declarations of rights prohibited standing armies in times of peace and declared that the military must be under civil authority, and three colonies (Virginia, Pennsylvania, and Massachusetts) expressly protected the right to bear arms. The idea of self-preservation derived from the people was a fundamental concept which would animate the forthcoming debates about the proper organization of the new federal government, including the arrangement of its military structure. How this revolutionary experience would be codified into a formal structure of republican government would be the next challenge for early Americans, particularly the question of balancing a federal standing army with the newly established state militias. Thus the philosophical, constitutional, and practical concerns of the Revolutionary era regarding the right to keep and bear arms set the stage for the drafting of the federal Constitution and the eventual language of the Second Amendment, providing the historical context which continues to frame the current debate about gun rights in American politics.

Chapter Three:

Bearing Arms in Colonial America

The meaning of the Second Amendment, and how it should be applied to the issue of gun rights in contemporary American politics, has been widely debated by both supporters of gun rights and advocates for gun control. The language, brief and slightly awkward in phrasing, is usually attributed to James Madison and understood in the context of the creation of the Bill of Rights. It is important to step back and examine, however, the precursors of the Second Amendment: the text of the Second Amendment finds its roots in colonial constitutions and state militia statutes, which provide insight into the earliest articulation of the right to bear arms in the United States and how it would later be interpreted. While arms-bearing in the early nation may appear far removed from the issues that dominate the current debate about gun rights in American politics, the historical background demonstrates how both the theoretical and practical concerns that animate the question of gun rights find their origins in the nation's Colonial era. Theoretically, early state constitutions were concerned with protecting the people's liberties from tyranny, which remains a fundamental tenet of the gun rights movement; practically, early militia statutes and gun laws sought to balance bearing arms with public safety, a primary goal of current gun control measures. Further, these historical documents reveal that – while not always the highly contentious issue so familiar in current times – the challenge of reconciling gun rights with gun control has always been present in American politics.

Still, arms-bearing in colonial America was more of a pragmatic concern rather than a political matter, closely linked to militia duty to ensure that the colonies could defend themselves against tyranny, both foreign and domestic. Across the young nation, citizens had a duty to serve in their local militia, which would be a well-regulated institution – not just an armed populace –

reliant on virtuous yeomen committed to the common good; the success of republican government in America required that all eligible citizens would be willing to serve as armed soldiers in the militia. Thomas Pownall, a Massachusetts colonist, wrote: "Let therefore every man, that, appealing to his own heart, feels the least spark of virtue or freedom there, think that it is an honor which he owes himself, and a duty which he owes to his country, to bear arms."[108] A proper militia was not just drilled in the use of arms, but functioned as a political institution that guided the republican populace. As founder Josiah Quincy opined, "The sword should never be in the hands of any, but those who have an interest in the safety of the community," which depended on a well-regulated militia, "composed of men of fortunes, of education, and virtues…excited to the most vigorous action, by motives infinitely superior to the expectation of the spoils."[109] The militia system served as the organizing principle to define the right to bear arms in early America, which was established both in theory and in practice: early state constitutions laid the foundation for the wording of the Second Amendment, while state militia statutes and gun laws outlined the parameters of how the right to bear arms would be practically applied. It is from this historical framework that the notion of gun rights eventually emerged, and many of these historical themes continue to resonate in the modern debate about gun rights in American politics.

The Right to Bear Arms in Theory: Early State Constitutions

Republican political theory shaped both the intellectual and political context of the Colonial period and influenced the language of early state constitutions, which would later shape

[108] Thomas Pownall, "The Exercise for the Militia of the Province of Massachusetts-Bay, by Order of His Excellency," in *The Remembrancer, or Impartial Repository of Public Events*, volume VIII (London, UK: J. Almon, 1775-1784), 91.
[109] Josiah Quincy, Jr., *Observations on the Act of Parliament, Commonly Called the Boston Port Bill; with Thoughts on Civil Society and Standing Armies* in Josiah Quincy, Jr., *Memoir of the Life of Josiah Quincy Jun*. (Boston, MA: Cummings, Hill, & Co., 1825), 41-43.

the text of the federal Constitution and the Bill of Rights. The major themes of early state constitutions and bills of rights situated the right to bear arms within a distinctly military framework, emphasizing the fear of standing armies, civilian control of the military, and the importance of militia service. Early constitutions suggest that – while the nature of arms-bearing differed among the colonies – there was wide consensus that citizens were duty-bound to serve in their local militia. Implicit to that duty was the right to bear arms under the auspices of a well-regulated militia subject to state regulation, with the intention of securing the interests of the state as well as protecting the citizens' liberties from tyranny. Still, while there was broad agreement throughout the colonies that bearing arms was essential to the militia system, there was no common legal model to define the parameters of the right to keep and bear arms, resulting in variances among early constitutions.

In the year following the Declaration of Independence, many colonies established state constitutions (South Carolina, Virginia, New Jersey, Pennsylvania, Delaware, Maryland, and North Carolina) and between 1777 and 1784, the remaining colonies created their constitutions or continued to operate under royal charters. South Carolina was the first colony to form a constitution and included mention of bearing arms in its preamble:

> Hostilities having been commenced in the Massachusetts Bay, by the troops under command of General Gage, whereby a number of peaceable, helpless, and unarmed people were wantonly robbed and murdered, and there being just reason to apprehend that like hostilities would be committed in all the other colonies, the colonists were therefore driven to the necessity of taking up arms, to repel force with force, and to defend themselves and their properties against lawless invasions and depredations.[110]

Though the South Carolina constitution did not articulate a *right* to bear arms, stating only that "the colonists were therefore driven to the necessity of taking up arms," the preamble was the

[110] *Extracts from the Journals of the Provincial Congress* (Charles-Town, MA: Peter Timothy, 1776), 137-138.

first in the colonies to address arms-bearing directly. Most of the state constitutions implied a qualified right to bear arms in connection to militia service, but unique among the colonies were the constitutions of Virginia, Pennsylvania, and Massachusetts: these documents established the right to bear arms as a distinct political right of the people and would provide a framework for arms-bearing provisions in subsequent state constitutions. While these texts shared many similar themes (including the fear of standing armies; the sovereignty of the people and civilian control over the military; and, above all, the importance of a citizen militia), they differed to reflect specific state interests, rendering the early understanding of the right to bear arms already closely linked to concerns about federalism.

Virginia

Virginia was the first colony to include a bill of rights in its constitution, which would serve as a model for many of the other colonies' statements of rights. At the time, Virginia was a particularly influential, being both the wealthiest and most populous colony and home to many prominent political thinkers and leaders. George Mason, a strong advocate for colonial independence, was the primary writer of the Virginia Declaration of Rights in 1775. His draft of the bill of rights reflected Virginia's wholehearted belief in the militia ideal, arguing that the Virginia militia should be prepared and armed in readiness for war with Britain. Further, the republican political order must be defended by an armed citizenry led by "gentlemen of the first fortune and character."[111] The draft of the Virginia Declaration of Rights sought to clarify the proper role of the military in a free society, declaring:

> Resolved, That this Committee [of Safety] do concur in opinion with the Provincial Committee of the Province of Maryland, that a well regulated Militia, composed of

[111] George Mason, "Fairfax County Militia Association," in Robert Rutland, ed., *The Papers of George Mason*, (Chapel Hill, NC: University of North Carolina Press, 1970), 210-212.

> gentlemen freeholders, and other freemen, is the natural strength and only stable security of a free Government.[112]

Emphasis on "gentlemen freeholders" indicated that some leaders were wary of arming the common people; for an armed citizenry to be a well-regulated militia rather than an armed mob, the parameters of arms-bearing must be clearly defined in favor of discretion and order. Still, after the legislature debated the language, the freehold requirement was dropped in favor of a uniform militia "composed of the body of the people." The final language read:

> That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.[113]

The Virginia Declaration of Rights situated the right to bear arms in the context of a well-regulated militia, thus establishing a communal duty to serve in the militia as a political obligation. Other Virginians, however, particularly Thomas Jefferson, favored a provision that would have protected an individual right to bear arms. In an argument that continues to resonate in the modern debate about gun rights in American politics, Jefferson argued that any prohibition to the individual right to bear arms only benefitted criminals. Influenced by the Italian Enlightenment thinker Cesare Beccaria, Jefferson circulated a proposal for the state constitution that would have extended the right to bear arms outside of militia service, declaring that "no free man shall be debarred the use of arms," later qualifying the language to read that "no free man shall be debarred the use of arms [within his own lands or tenements]."[114] Jefferson's individualist conception of the right to bear arms did not pass the constitutional convention,

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[112] George Mason, "First Draft of the Declaration of Rights," *The Papers of George Mason*, 284.
[113] Virginia Declaration of Rights, Section 13 (1776).
[114] Thomas Jefferson, in Julian P. Boyd, ed., *The Papers of Thomas Jefferson* (Princeton, NJ: Princeton University Press, 1950), 353.

leaving Mason's militia provision to stand unchanged. Still, Jefferson's proposal for a more extensive right to bear arms indicated that – while there was broad agreement at the time that the right to bear arms was a right of the people under the auspices of militia service – the matter was not entirely settled.

Pennsylvania

In contrast to Virginia, Pennsylvania's position on the right to bear arms reflected not the concerns of landowners, but the interests of small farmers, laborers, and tradesmen. Pennsylvania was the first colony to expressly protect the right of *the people* to bear arms; written in 1776, the Pennsylvania state constitution asserted that "the people have a right to bear arms for the defence of themselves and the state."[115] The language of Pennsylvania's constitution directly reflected the politics of the time: western Pennsylvania frontiersmen sought protection from Indian attacks but had been thwarted by the state legislature, which was dominated by eastern Quakers who refused to enact militia laws or provide arms for defense. Tensions escalated when a group of westerns attacked a tribe of Conestoga Indians in retaliation for earlier confrontations. In language that anticipated the state Declaration of Rights, "The Apology of the Paxton Volunteers" (1763) stated:

> When we applied to the Government for Relief, the far greater part of our Assembly were Quakers, some of whom made light of our Sufferings & plead Conscience, so that they could neither take Arms in Defense of themselves or their Country, nor form a Militia law to oblige the Inhabitants to arm.[116]

Rural frontiersmen had struggled for years to gain legal recognition under militia law to arm themselves against attacks, claiming the legislature had failed to provide adequately for their

[115] Pennsylvania Declaration of Rights, Article XIII (1776).
[116] "The Apology of the Paxton Volunteers" (1764), in John R. Dunbar, ed., *The Paxton Papers* (The Hague: Martinus Nijhoff, 1957), 187.

defense. While the legislature was permitted under existing militia law to provide arms to frontier towns for the common defense, they continually refused to do so.[117] The Pennsylvania Constitution declared the people had the right to "bear arms in defense of themselves and the state," meaning that localities now possessed the right to defend themselves with armed and trained militias. As with many early constitutions, the right to bear arms was understood in the context of a state militia as an alternative to a standing army:

> That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination to, and governed by, the civil power.[118]

Just as Virginia's militia was "composed of a body of the people," "the people" in Pennsylvania's constitution implied that citizens would serve in the militia; "themselves" in the phrase referred to the people as a collective civic body. The language of Pennsylvania's constitution reflected a separation between the people and the government, reminiscent of John Locke's compact theory of government. "Defence of themselves" signified the people's right to protect themselves and their property from threat; "defence of…the state" indicated the people's role in establishing and protecting a state government based on popular sovereignty. In sum, the clause functioned to protect the right of the people to bear arms in the service of the state militia, defending both the collective body of the state as well as their individual liberties.

While western Pennsylvanians won a political victory with the arms-bearing provision in the state constitution, the authority of Quaker leaders still influenced the final document. The

[117] For a comprehensive history of Pennsylvania's early years, see Philip S. Klein and Ari Hoogenboom, *A History of Pennsylvania* (State College, PA: Pennsylvania State University Press, 1980).
[118] Pennsylvania Declaration of Rights, Article XIII (1776).

state constitution not only established the right to bear arms, but also protected the right *not* to bear arms:

> That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such an equivalent: Nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.[119]

Quakers and other religious groups committed to pacifism sought exemption from the duty to bear arms; since the state could require citizens to serve in the militia, Quakers demanded a guarantee that they would not be forced to bear arms. Similar to the constitutional theory of Sir William Blackstone, the Pennsylvania constitution established a constitutional right bear arms for general defense in contrast to the common law right of self-defense, meaning the state could compel a citizen to bear arms for militia service but could not force an individual to bear arms in self-defense. "Any man who is conscientiously scrupulous of bearing arms" was thus free to chose whether or not to bear arms, as long as he provided a suitable replacement for his militia service.

Further, the example of the Pennsylvania constitution demonstrates that the right to bear arms in early America was a distinct political obligation rather than a protected individual right. Citizens had a duty to bear arms as part of their commitment to well-regulated political order, hence those unwilling to do so (in the case of the pacifist Quakers) were required to provide a financial equivalent. The right to bear arms functioned as a form of political obligation, similar to voting or jury service, rather than a protected right of individuals. The state constitution first

[119] Pennsylvania Declaration of Rights, Article VIII (1776).

established the duty to bear arms in the state militia, then put forth the constitutional right: the phrase the "right of the people" meant the right of an individual *within* the collective body of the people acting for the common good, or, as Pennsylvania politician Albert Gallatin described, the "right of the people at large." The people as a collective body were expected to serve in the militia, "in defence of themselves and the state," to protect both local communities as well as the entire state from internal threats (riots and insurrections) and external threats (foreign attacks). Pennsylvania also provided a broad definition of the militia, allowing the state wide discretion to determine the organization of its military structure:

> The freemen of this commonwealth and their sons shall be trained and armed for its defence under such regulations, restrictions, and exceptions as the general assembly shall by law direct, preserving always to the people the right of choosing their colonels and all commissioned officers under that rank, in such a manner and as often as by the said laws shall be directed.[120]

Though the language of the Pennsylvania constitution appeared more sweeping in scope than other colonies, it established the people's right to bear arms firmly within the parameters of militia service, expecting citizens to fulfill their duty to provide for the common defense of the state.

Further, unlike many of the other colonies, Pennsylvania also included a separate provision that established the right to bear arms for the purpose of hunting. In contrast to England, where the right to hunt was exclusive to the landed gentry, Pennsylvania provided a general right to hunt:

> The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the land they hold, and on all other lands therein not inclosed; and in like manner to fish in all boatable water, and others not private property.[121]

[120] Constitution of Pennsylvania, Section 5 (1776).
[121] Constitution of Pennsylvania, Section 43 (1776).

State lawmakers, aware that British law reserved hunting rights to the nobility – effectively disarming the majority of the people – instead granted a broad right to hunt. Still, regulation was implicit, as hunting could be limited in terms of season and property; for example, one law forbade anyone who "shall presume to carry any gun, or hunt" on private land without authorization and also prohibited anyone "to fire a gun on or near any of the king's highways."[122] The decision to differentiate bearing arms for militia service from hunting indicated two distinct notions of rights: one a political right (bearing arms in the service of the militia), protected by the state constitution, and the other a personal right (bearing arms for the purpose of hunting), regulated by common law.

Massachusetts

The right to bear arms in the Massachusetts constitution was similar to Virginia and Pennsylvania in its emphasis on the collective defense of the state, but differed in that it was the first state constitution to protect the right of both keeping *and* bearing arms "for the common defence." The Massachusetts constitution stated:

> The People have a right to keep and bear arms for the common defence. And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in exact subordination to the civil authority, and be governed by it.[123]

Colonial militia laws, which established the requirements for training and arming of the militia, used the phrase "to bear arms" as synonymous with "to carry arms;" bearing arms, then, was understood in a military context: by connecting the right to *keep* arms with the right to *bear* arms, the Massachusetts constitution articulated a right that was clearly linked to military

[122] John Purdon, ed., *An Abridgement of the Law of Pennsylvania*, 1700-1881 (Philadelphia, PA: Farrand, 1811), 208.
[123] Constitution of Massachusetts, Article XVII (1780).

service. Citizens were often required to provide their own arms (and keep them in their homes) in order to serve in the local militia, a condition necessary to fulfill the obligation to defend Massachusetts.[124] However, similar to the western frontiersmen of Pennsylvania, two towns in western Massachusetts advocated for a more robust right to keep and bear arms as an individual right separate from the duty to serve in the militia. Northampton and Williamsburgh demanded the state constitution include a clear statement of the right to bear arms for personal self-defense. The town of Northampton feared "that the people's right to keep and bear arms…is not expressed with that ample and manly openness and latitude which the importance of the right merits" and argued the constitution should provide for "the people [to] have a right to keep and bear arms as well for their own as the common defense."[125] Williamsburgh claimed "that we esteem it an essential privilege to keep Arms in our houses for Our Own Defense and while we Continue honest and Lawfull Subjects of Government we Ought Never to be deprived them." Williamsburgh also feared that the state would require the collective storage of weapons, effectually confiscating citizens' private arms: leaders worried "that the legislature in some future period may Confine all the fire Arms to some publick Magazine and thereby deprive the people of the benefit of the use of them."[126] While these towns were not successful in establishing an individual right to bear arms in the state constitution, their attempt demonstrated a deep-seated fear that a tyrannical government could disarm state militias and control their stores; for the people of Northampton and Williamsburgh, the distant state government in Boston

[124] There is wide scholarly discussion regarding the distinction between the right to "keep" arms and the right "bear" arms, extending into the Supreme Court's majority opinion in *District of Columbia v. Heller* (2008). It is largely a partisan debate regarding the collectivist versus individualist interpretation of the Second Amendment. For a comprehensive summary, see Gary Wills, "To Keep and Bear Arms," *New York Review of Books* 42 (1995): 62-73; and Patrick J. Charles, *The Second Amendment* (Jefferson, NC: McFarland, 2009), 22-34.
[125] Oscar and Mary Handlin, eds., *The Popular Sources of Political Authority* (Cambridge, MA: Harvard University Press, 1966), 574.
[126] Ibid., 624.

was just as threatening as the British government overseas. The western outliers were influenced both by their geographical location – they were more vulnerable to external attacks than well-populated Boston and its surrounding towns – but also by the colonial belief that *any* centralized government could become tyrannical without the citizens keeping a vigilant watch, preferably armed. Such opinions were not the norm, however. John Adams and the other framers of the Massachusetts constitution understood the right to bear arms to be closely linked to political obligations and legal duties, as citizens had both the right to bear arms, as well as the duty to arm themselves in order to meet their requirement to serve in the militia. Still, the western outliers provide insight into the eventual wording of the Second Amendment, with its the emphasis on state protection from federal tyranny and the guarantee of the people's liberties.

By 1784, the majority of the colonies had formal constitutions, many of which included provisions similar to the constitutions of Virginia, Pennsylvania, and Massachusetts that established the right to bear arms in the context of the state militia. Maryland, for example, did not expressly grant a right to bear arms, but asserted the presence of a militia as an antidote to a standing army: "A well-regulated militia is the proper, natural and safe defence of a free government."[127] North Carolina included similar language: "That the people have a right to bear Arms for the Defence of the State; and as standing Armies in Time of Peace are dangerous to Liberty, they ought not to be kept up."[128] Vermont, borrowing heavily from the Pennsylvania Declaration of Rights, asserted "that the people have a right to bear arms for the defence of themselves and the State; and, as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up" and also provided a provision for "any man who is conscientiously

[127] Maryland Declaration of Rights, Article XXV (1776).
[128] North Carolina Declaration of Rights, Article XVII (1776).

scrupulous of bearing arms" to be exempted from service. [129] Rhode Island, Connecticut, Georgia, New York, New Jersey, and South Carolina did not include specific bills of rights and, while their constitutions provided for various protections of liberties, the right to bear arms was not mentioned. Still, leading up to the Constitutional Convention, the right to bear arms was widely established throughout the colonies as a constitutional principle intended to protect the right of the people to serve in their state militia, and to protect state governments for federal encroachment.[130]

The Right to Bear Arms in Practice: Early Militia Statutes and Gun Legislation

Life in early America was precarious and dangerous, meaning that every man needed his gun for both practical reasons (hunting for food and self-defense) but also for political reasons (the protection of liberties from centralized tyranny); the right to bear arms was fundamental to the civic and political framework of colonial America and formed the basis for the conception of the armed citizen-soldier. Massachusetts, for example, required in a 1645 law "that all inhabitants…are to have armes in their houses fit for service."[131] Likewise, early colonists arriving in Virginia were expected to provide their own guns and gunpowder; Governor Lord Le La Warr declared in 1661: "All targeteers were ordered to carry either flint or wheel lock pistols."[132] As firearms technician and historian Philip B. Sharpe wrote, "The early American

[129] Constitution of Vermont, Article I, section 15, section 9 (1777).
[130] For a comprehensive account of early state constitutions, see Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era*, Rita and Robert Kimber, trans. (Lanham, MD: Rowman and Littlefield, 2001); and Robert Maddex, *State Constitutions of the United States* (Washington, DC: CQ Press, 2005).
[131] Nathaniel B. Shurtleff, ed., *Records of the Governor and Company of the Massachusetts Bay in New England* (Boston, MA: W. White, 1853-1854), 119.
[132] Martial Laws of Virginia, 1611, cited in Harold L. Peterson, *Arms and Armor in Colonial America* (New York, NY: Bramhall, 1956), 38.

rifle dates back to the beginning of America itself. This country was born with the rifle in its hand."[133]

While bearing arms in Europe was organized by social class – essentially limiting firearms to the aristocracy – practical concerns in the colonies required that all citizens (who had access to weapons) to be armed and ready to defend the colony, forming a political obligation between the government and governed. The armed citizen replaced the older European ideal of the armed gentlemen: rather than an aristocrat hunting for sport, the American gun owner was a rural farmer or artisan, tending to his fields or craft until duty called to take up arms in defense of himself, his property, and the state. As British politician William Gerard Hamilton direly cautioned in 1767:

> There are, in the different provinces, about a million people which we may suppose at least 200,000 men able to bear arms; and not only able to bear arms, but having arms in their possession, unrestrained by any iniquitous Game Act. In the Massachusetts government particularly, there is an express law, by which every man is obliged to have a musket, a pound of powder, and a pound of bullets by him…[134]

However, the right to bear arms was not unlimited in colonial America, but widely regulated in the name of a well-ordered republican political order governed by law. The notion of an armed citizenry was fundamental to what would become the American militia system, which the colonies began to organize soon after they established formal governments.

Bearing Arms for the Common Defense

Bearing arms in the service of militia duty was treated as a different type of right than that of self-defense or personal arms usage, and was regulated accordingly. There was a clear legal distinction between the right to bear arms for the common defense and bearing arms for

[133] Philip B. Sharpe, *The Rifle in America* (New York, NY: William Morrow, 1938), 4.
[134] William Gerard Hamilton to Gerard Calcraft (1767), in Frank M. Mumby, ed., *George III and the American Revolution* (London: Constable, 1924), 173.

personal use. Weapons possessed for the purpose of militia service were constitutionally protected, but other arms were subject to regulation by the state legislature: the government often kept records of gun ownership; confiscated weapons from private citizens; regulated the storage of gunpowder; and restricted the use of firearms at certain locations or occasions. The states, acting under their police powers, had broad regulatory authority over non-militia gun use, primarily concerned with the right to hunt and the right to self-defense. For example, James Madison proposed a bill to the Virginia legislature in 1785 that imposed a heavy fine for those caught hunting deer out of season or on another's land: people would be penalized who "shall bear a gun out of his inclosed ground, unless whilst performing military duty."[135] Similarly, bearing arms in the name of self-defense was widely regulated as a common law issue within the state's police powers to preserve public safety. For example, the Pennsylvania Declaration of Rights asserted that "the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."[136] States varied in their self-defense laws, but overall bearing arms in military service compelled a citizen-soldier to stand his ground while bearing arms for personal self-defense (as defined by state common law), requiring retreat before using force. Bearing arms under the auspices of militia duty, then, was understood as a different type of right than keeping weapons for personal use, but was still carefully regulated by the states.

Types of Firearms

While there was a distinction between bearing arms for military service and acquiring weapons for other purposes, there was much overlap in the type of permissible weapons, as

[135] James Madison, "A Bill for the Preservation of Deer" (1785), in Julian P. Boyd, ed., *Papers of Thomas Jefferson* II (Princeton, NJ: Princeton University Press, 1950), 443.
[136] Pennsylvania Declaration of Rights, Section III (1776).

military-grade guns and hunting weapons were often used for similar purposes. Indeed, many Minutemen arrived at musters bearing long rifles intended for hunting, or antique weapons more suitable for decoration than active military service. A militiaman from Lynn, Massachusetts, for example, carried a "long fowling piece, without a bayonet, a horn of powder, and a self-skin pouch, filled with bullets and buckshot." Others arrived with no arms at all, but rather carried decorative powder horns, swords, or even canes.[137] Guns in the Revolutionary era were expensive and cumbersome, and it was often more practical for colonists to invest in utilitarian hunting weapons rather than military apparatus. While some colonial legislatures passed laws requiring militiamen to report for duty bearing military-grade muskets, many failed to do so; in response, colonists requested arms from their local government, again without much effect.

The colonists were eager to acquire the best arms from Europe and modify them for American conditions. The most common guns available to early Americans were the wheel lock, the matchlock, and the snaphance. The wheel lock was relatively rare, being both expensive and complicated to operate as it was heavy and needed to be mounted in order to shoot. As Plymouth colonist Edward Winslow described: "Bring every man a musket or fowling piece. Let your piece be long in the barrel, and fear not the weight of it, for most of our shooting is done from stands."[138] It used a rotating wheel through which sparks passed to ignite the gunpowder, which had to be rewound and released for each shot.[139] The wheel lock was soon replaced with more modern weapons, such as the matchlock, but they were hardly more convenient to shoot. The matchlock relied on a burning wick as its ignition system and had to be lit with a match, which was often hard to maintain; if ignited too soon, the gun could easily

[137] David Hackett Fischer, *Paul Revere's Ride* (New York, NY: Oxford University Press, 1994), 161.
[138] Lee Kennet and James LaVerne Anderson, *The Gun in America* (Westport, CT: Greenwood Press, 1975), 36.
[139] Sharpe, *The Rifle in America*, 4.

injure the shooter.[140] For proper operation, it required calm weather, dry gunpowder, and a still target, conditions relatively rare in colonial America. Finally, the most commonly used weapon was the snaphance, the predecessor to the flintlock rifle. This gun required a flint to be sparked, igniting the gunpowder and allowing for the shot.[141]

Americans were quick to adapt older gun models to more innovative designs. Many of the European muskets were challenging to operate due to their weight, size, and the excessive amount of gunpowder required. A new type of rifle was developed in Lancaster, Pennsylvania in the early 1700s, where a group of gunsmiths adjusted the traditional German rifle (which was large and ornamental, with a short barrel and a long bore) for more utilitarian purposes. The Pennsylvanians removed the excess decoration, lengthened the barrel, and reduced the caliber in order to use less gunpowder, rendering the weapon lighter to use and less expensive to maintain. They also developed a new system for loading the gun: rather than hammer the bullet into place, the shooter used a greased patch to settle the bullet into the barrel. Throughout the colonies, small gun shops handmade customized rifles, producing fine examples of American craftmanship but also weapons that were easily damaged. (Because these rifles needed frequent repair, gunsmiths became one of the first highly trained artisans in the fledgling economy.)[142] Gunpowder was also a concern; as it was expensive and inconvenient to import, colonies began producing and storing their own. Still, while guns were largely accessible in the colonies, it is unclear how many citizens actually possessed firearms.[143] According to political scientist Robert

[140] Sharpe, *The Rifle in America*, 3.
[141] Kennet and Anderson, *The Gun in America*, 36-37. For a full account of guns and accoutrements in the colonial era, see Harold L. Peterson, *Arms and Armor in Colonial America, 1526-1783* (New York, NY: Bramhall House, 1956); and Carl P. Russell, *Guns on the Early Frontier* (New York, NY: Bonanza Books, 1957).
[142] Felix Reichman, "The Pennsylvania Rifle: A Social Interpretation of Changing Military Techniques," *Pennsylvania Magazine of History and Biography* 69 (1945): 8-10.
[143] Historian Michael Bellesiles made the argument in his 2000 book *Arming America* that gun ownership, in contrast to the popular myth of the armed citizen, was relatively rare in the colonies; his research has subsequently

J. Spitzer, "We can reasonably conclude that from the early eighteenth century on, civilian gun ownership probably fluctuated around or below the 50 percent number (bearing in mind variations by region, time period, degree of military threat, and other circumstances), with the vast majority of these firearms (over 90 percent) being long guns."[144]

Nor is it fair to assume that possessing a firearm meant that the owner was a proficient marksman. Many colonists were not trained in arms beyond the domestic pursuit of small game. Further, militia muster days, by many accounts, were not highly disciplined military exercises, but rather rambunctious social occasions. Historian Edmund Morgan writes, "Training day was a boisterous holiday, accompanied by light talk, heavy drinking, and precious little training."[145] A British political cartoon from 1779 depicts a rowdy crowd of unorganized militiamen, lacking proper formation or carriage, accompanied by bottles, dogs, and young ladies presumed to be prostitutes.[146] As a result, leaders began to circulate pamphlets to guide localities in organizing their militias, urging greater uniformity, discipline, and proper training. For instance, future Congressman Timothy Pickering penned two influential militia treatises, the first a letter to the *Essex Gazette* signed "A Military Citizen" and the second tract, *An Easy Plan for the Militia*, in 1775. Pickering demanded that militiamen be trained not just in the correct use of military-grade weapons, but in all aspects of military order and discipline, as marksmanship was of no use if the militia did not operate as a disciplined collective body: "But granting that we had the most perfect Use of the Firelock (which is no Means true) and could load and fire with the exactest

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been shown to have been falsified. In response to the scandal, however, other scholars have revisited Bellesiles' thesis to provide an accurate account of gun ownership in early America. For example, see Kevin M. Sweeney, "Firearms, Militias, and the Second Amendment," in *The Second Amendment on Trial*, Saul Cornell and Nathan Kozuskanich, eds., (Amherst, MA: University of Massachusetts Press, 2013), 310-382.

[144] Robert J. Spitzer, *Guns Across America* (New York, NY: Oxford University Press, 2015), 37.

[145] Edmund S. Morgan, *The Birth of the Republic, 1763-1789* (Chicago, IL: University of Chicago Press, 1992), 68.

[146] Richard Godfrey, "A Field Day, of the City Militia" in Patrick J. Charles, *Armed in America* (Amherst, NY: Prometheus, 2018), 79.

Uniformity…[that] would do us very little Service, and before we could get in Order again, the Enemy might cut us to Pieces."[147] Further, it became clear that more consistent gun legislation needed to be established, both for the proper training of the militia but also for public safety. Overall, early gun regulations fell into three categories: storage requirements; conditions for confiscation; and most importantly to the political development of the Second Amendment, militia statutes.

Storage and Transportation Laws

The first category of colonial gun laws focused on the safe storage and transport of guns and gunpowder. For example, Boston forbade its citizens from keeping loaded weapons in their homes: a 1786 statute gave the state authority to confiscate weapons and impose fines on those in violation of the law. Also, since guns were often fired as an alarm, Massachusetts law prohibited muskets from being shot at night.[148] Further, regulations mandated how much gunpowder one could possess, how much one could keep at home, and how it was stored, such as a New York law that required gunpowder to be separated "into four stone jugs or tin cannisters, which shall not contain more than seven pounds each."[149] In Pennsylvania, gunpowder must be kept "in the highest story of the house…unless it be at least fifty yards from any dwelling house" and if people owned more powder than permitted, they were required to store it in a public magazine.[150] Transportation of gunpowder was also regulated. In Massachusetts, for example, gunpowder had to be moved "in a wagon or carriage, closely covered with leather or canvas, and without iron on any part thereof, to be first approbated by the Firewards of said town, and

[147] Timothy Pickering, "A Military Citizen," *Essex Gazette* (Salem, MA), 21 February 1769.
[148] Kennet and Anderson, *The Gun in America*, 46.
[149] Act of 13 April 1784 (New York Laws 627), chapter 28.
[150] Act of 6 December 1783 (Pennsylvania Laws XLII), section 41.

marked in capitals, with the words *approved powder carriage*." Massachusetts also stipulated how guns were moved: "The depositing of loaded Arms in the Houses of the Town of Boston, is dangerous" and required confiscation and a fine to anyone with a loaded weapon in "any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building." The general point of such laws, under the auspices of state police powers, was to protect the community from fires or explosions and to prevent citizens from stockpiling ammunition in a hidden arsenal.[151]

Confiscation and Disarmament

Another set of laws regulating firearms in early America focused on the confiscation of arms and the disarmament of citizens; while the state could require citizens to be armed to serve in the militia, it could also forbid certain groups from possessing weapons. These laws tended to focus on troublesome political groups, such as religious dissenters. For example, Massachusetts confiscated arms from religious groups it deemed dangerous, such as the followers of John Wheelwright and Anne Hutchinson, who were ordered to be disarmed unless willing to recant their religious beliefs.[152] Race was also an issue: the first restrictive gun law in the colonies was in Virginia (1640), which prevented slaves from possessing firearms; other southern states, afraid of armed slave uprisings, passed similar legislation. For example, South Carolina forbade slaves from bearing arms outside the perimeter of their owner's property and white owners were required to keep their guns "in the most private and least frequented room in the house." Other

[151] Act of 26 June 1792 (Massachusetts Acts 208), chapter X.
[152] Nathaniel B. Shurtleff, ed., *Records of the Governor and Company of the Massachusetts Bay in New England,* volume I (New York, NY: AMS Press, 1968), 211-212.

southern colonies required white men to be armed at church in case slaves should take advantage of the Sabbath to revolt.[153]

Weapons could also be confiscated if citizens refused to take an oath of loyalty to the state. During the Revolutionary period, many states passed laws requiring citizens to take an oath of allegiance to their state or the provisional federal government; the purpose of these oaths was to secure the safety of the community from armed Loyalists, and if they refused, their weapons would be confiscated. For example, if a resident of Pennsylvania "refuse[d] or neglect[ed] to take the oath or affirmation [of allegiance]," that person was required to turn over his arms to the state and was prohibited from carrying arms or keeping them at home.[154] Massachusetts passed legislation in 1776 that disarmed "such Persons as are notoriously disaffected to the Cause of America, or who refuse to associate to defend by Arms the United States Colonies."[155] (This statute reflects an irony of many early gun laws: the punishment for *not* bearing arms in the service of the state was the removal of arms.) Further, many state laws required all men over sixteen to take an oath of allegiance to the "United American Colonies," including a prohibition against aiding the British cause and an affirmation that the war against England was "just and necessary." The penalty for refusing to take the oath was that person would be "disarmed…[of] all such Arms, Ammunition, and Warlike Implements, as by the strictest Search can be found in his Possession or belonging to him."[156] Quakers and other pacifist groups tended to be exempt from such loyalty oaths and had different requirements that respected their religion's beliefs: often, they did not have to endorse the war against England or

[153] Thomas Cooper and David James McCord, eds., *Statutes at Large of South Carolina*, volume VII (Columbia, SC: A.S. Johnston, 1836-1841), 352-357.
[154] Act of 1 April 1778 (Pennsylvania Laws 126), chapter LXI.
[155] Act of 14 March 1776 (Massachusetts Acts 31), chapter VII.
[156] Ibid.

bear arms in defense of the colonies, but must agree that they would not assist the British or pass on intelligence to the enemy. Other states established statutes that effectively disarmed "dangerous" groups of people, including slaves, Freeman, and Native Americans, which were also imposed through the requirement of loyalty oaths. For example, Pennsylvania enacted a series of laws called the Test Acts, which stipulated that any citizen who refused to take loyalty oath to the state was barred from holding office, serving on juries, and keeping weapons, as they were considered "persons disaffected to the liberty and independence of this state."[157]

The objective of such laws and the punishment of confiscation reflected both concerns about public safety, but also the political viability of the state. These laws were intended to deny those deemed dangerous to the colony, personally and politically, from keeping and bearing arms. As evident in the Test Acts, refusing to take loyalty oaths was punished through other means as well: not only were arms confiscated, but dissenters were often denied other rights; for example, certain laws prohibited lawyers and professors from practicing or forbade citizens from bringing a case before the court. Cherished political rights were also denied, such as participating in state government, serving on a jury, and voting. That bearing arms was situated in the context of other political rights suggests that the early conception of the right to bear arms was both pragmatic and political in nature. If citizens did not fulfill their obligation to the state (in this case, by swearing a loyalty oath) they were stripped of those rights that functioned as political duties, such as serving on a jury or bearing arms for militia service; including the right to bear arms within the panoply of other civic rights established it as the political obligation of

[157] "An Act for Repealing Part of an Act, 1779," *The Acts of the General Assembly of the Commonwealth of Pennsylvania* (Philadelphia, PA: n.p., 1782).

citizens to contribute to a well-regulated republican order. Bearing arms was seen as one civic right among many and required political participation from the virtuous citizen.

Militia Laws

The most important laws regulating firearms in the early republic – and most relevant to the eventual wording of the Second Amendment – were state militia statutes. These laws usually dictated who was eligible (thus required) to serve in the militia, who was exempt, and what weapons and other supplies were necessary to fulfill militia service. States varied in their specifications, but overall most able-bodied white men fell under the militia requirements. For example, Virginia passed legislation in 1622 requiring all able-bodied men aged sixteen to fifty to serve in the militia. New York declared "every able bodied male person Indians and slaves excepted" aged sixteen to fifty must serve in the militia. In 1631, Massachusetts demanded all men (except ministers and magistrates) to enroll in the militia and furnish their own weapons, with those failing to muster to be hired out as servants. Massachusetts also divided the militia into two groups: a trained militia, and an alarm list ready in case of emergency – an arrangement that would anticipate later federal debates about select versus universal militias. Some states, such as South Carolina, simply required all men between eighteen and fifty to serve in the militia. Since the new colonies often lacked funds to train the militias, some included provisions that required citizens to provide their own guns for drills and training. (For example, legislation in Virginia passed 1637 mandated regular target practice to assure that colonists would be prepared in case of Indian attacks.) Exceptions, besides health and age, tended to be based on race or certain protected professions, the most common being clergy, elected officials, and professors. Colonial militia laws sought to provide a legal framework for the concept of the citizen-soldier, mandating how and when musters would be called, the election of officers, and

weapons requirements. Local militias, however, were often not well organized; citizens frequently failed to attend musters or brought inadequate weapons, such as personal firearms used for hunting rather than military arms, rendering the early colonial militia system largely disorganized and unprofessional. [158]

The Unsettled Colonial Militia

The tenuous nature of the early American militia system was apparent in local skirmishes, such as the Bacon Uprising in Virginia of 1676. At the time, bearing arms was a requirement for Virginia colonists, evident in the edict "that in going to churches and court in these times of danger, all people be enjoined and required to go armed for their greater security." Further, colonists were restricted from selling or trading arms with Indians, under the threat of death: "Be it enacted…that if any person…shall presume to trade, truck, barter, sell or utter, directly or indirectly, to or with any Indians any powder, shot, or arms…shall suffer death without benefit of clergy." [159] The punishment also included the seizure of property, half of which was awarded to the state and the other half to the informer of the violation. [160] Virginian Nathanial Bacon led an armed rebellion against Royal Governor Sir William Berkeley, who refused to retaliate against recent Indian attacks; Governor Berkely was also concerned that, as many of the colonists were commoners, any armed conflict could be threatening to the reigning British authority. (Sir William Berkeley lamented, "How miserable that man is that Governes a People…[who] are six parts of Seven at least Poore, Endebted, Discontented, and Armed."[161])

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[158] Kennet and Anderson, *The Gun in America*, 45-46.
[159] "An Act for the Safeguard and Defence of the Country Against Indians," *Hening's Statutes at Large* (Richmond, VA, 1675-1676), 333, 336.
[160] Ibid.
[161] Sir William Berkeley (1676), cited in John Shy, *A People Numerous and Armed* (Ann Arbor, MI: University of Michigan Press, 1976), xii.

Following the rebellion, the colonial legislature passed statues that restricted certain groups of armed colonists from assembling:

> Be it therefore enacted…that if any person or persons shall…presume to assembled together in arms to the number of five or upwards without being legally called together in arms the number five or upwards, they be held deemed and adjudged as riotous and mutinous…[162]

It was unclear if the early militia system was the keeper of public order or a tool of popular insurrection, evident in the Bacon Uprising and other armed encounters between official militias and rebels throughout the colonies.

Despite the unsettled nature of the early military system, however, a citizen militia was still preferable to the colonists rather than a standing army, and requirements for militia service were fairly uniform across the colonies. In sum, most laws mandated that citizens report for regular muster days and provide their own weapons and ammunition, which were subject to state inspection. For example, militia laws in New York stipulated that a militiaman must "furnish and provide himself at his own expence with a good musket or fire-lock fit for service[,] a sufficient bayonet with a good belt, a pouch or cartouch box containing no less than sixteen cartridges…of powder and ball…and two spare flints[,] a blanket, and a knapsack." Fines were imposed on those who failed to report for muster or whose weapons were deemed inadequate for militia duty. Detailed lists were maintained by the state of muster roll calls and the specifics of weapons ownership; further, private citizens could be summoned to serve in the militia at any given time, with their personal weapons often subject to inspection, which could be seized for public usage.[163]

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[162] "An Act for the Releife of Such Loyal Persons as have Suffered Losse by the Late Rebells," *Hening's Statutes at Large* (Richmond, VA, 1675-1676), 386.
[163] Act of 3 April 1778 (New York Laws 62), chapter 33.

Anticipating the Second Amendment

Many early constitutions and colonial militia statutes included preambles that proclaimed a well-regulated militia was essential to the preservation of the people's rights and liberties. These preambles – precursors to the structure and language of the Second Amendment – underscored the purpose of the law that followed and reminded the people of their duty to serve in the militia as members of a well-regulated republican order. For example, Massachusetts militia law from 1660 declared that "the well Ordering of the Militia is a matter of great concernment to the safety & welfare of this Commonwealth." Pennsylvania later went further, including a lengthy preamble to its 1757 Militia Act:

> Whereas *Self-preservation* is the first principle and law of nature, and duty that every man dispensibly owes…in a state of *political Society* and *Government*, all men, by their *original compact* and *agreement*, are obliged to unite in *defending* themselves and those of the same community, against such as shall attempt unlawfully to deprive them of their just rights and liberties, and it is apparent to every *rational creature*, that without defence no government can possibly subsist.[164]

Pennsylvania's militia law was characteristic of sentiments felt throughout the colonies: a well-regulated militia was essential to the protection of the people's rights. The state Militia Act declared that "a well-regulated Militia is the most effectual guard and security of every country" and necessary to the "safety and security of our constituents." The militia must be "armed, trained, and disciplined, in the art of war," in order to "defend themselves, their lives and properties, and preserve the many invaluable privileges they enjoy under their present happy constitution."[165] Other state militia laws used language that would eventually influence the text of the Second Amendment, reiterating the principle that a well-regulated militia was necessary to

[164] William Smith, ed., *The American Magazine and Monthly Chronicle for the British Colonies: Containing from October 1757 to October 1758*, volume I (Philadelphia, PA: William Bradford, 1758), 95.
[165] Smith, ed., *The American Magazine and Monthly Chronicle for the British Colonies: Containing from October 1757 to October 1758*, 95.

the protection of the people's liberties. For example, Maryland's militia law from 1777 declared: "Whereas a well regulated militia is the proper and natural defence of a free government…"[166] and New York's law stated that: "Whereas the Wisdom and Experience of Ages, point out a well regulated Militia, as the only secure Means for defending a State…"[167] In language that anticipated the Second Amendment, North Carolina's militia statute (1777) read: "Whereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State…"[168] Thomas Pickering summarized the importance of the militia in his 1775 treatise *An Easy Plan for the Militia*: "Almost every *free* State affords an Instance of a National Militia: For *Freedom* cannot be maintained without *Power*, and Men who are not in a Capacity to *defend* their *Liberties*, were certainly *lose* them."[169] Pickering's assertation highlighted the main themes that animated the drafting of early state constitutions, including the importance of a citizen militia rather than a standing army, and the expectation that the people would reign sovereign over military authority.

Such sentiments, read in conjunction with state constitutions and militia statutes, defined the early conception of the right to keep and bear arms and established the contextual framework from which the Second Amendment would emerge. The polarizing debate about gun rights in modern American politics renders the text of the Second Amendment largely familiar, but its historical provenance is often overlooked. It is worthwhile to remember that the antecedents to the Second Amendment – early state constitutions and militia statutes – provide the institutional

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[166] *Laws of Maryland, Made and Passed at a Session of Assembly, Begun and Held at the City of Annapolis, 16 June 1777* (Annapolis, MD: Fredrick Green, 1777).
[167] *The Laws of the State of New-York, Commencing with the First Session of the Senate and Assembly, after the Declaration of Independence, and the Organization of the New Government of the State* (Poughkeepsie, NY, 1782).
[168] "The Acts of Assembly of the State of North Carolina: At a General Assembly", in Walter Clark, ed., *The State Records of North Carolina, Laws 1777-1778*, volume 28 (Goldsboro, NC: Nash Brothers Book and Job, 1905).
[169] Timothy Pickering, *An Easy Plan of Discipline for the Militia* (Salem, MA: Samuel and Ebenezer Hall, 1775), title page.

structure that would guide the Framers in drafting the Second Amendment. Further, it is important to remind scholars and advocates (on both sides of the gun debate) that the right to bear arms has not always been a highly politicized issue: keeping and bearing arms in colonial America was largely a local matter related to militia service, understood as a necessary condition to well-regulated liberty under a republican government, a position that would hold true for much of the nation's history. Bearing arms was often more of a practical matter rather than a political concern; the people, as a collective body of citizens, assembled and armed themselves in the name of common self-defense, understanding that bearing arms was a duty to the state rather than a contentious argument about rights. Still, a common theme that emerges from this historical context is the importance of state interests in regulating the right to bear arms, an issue that is still relevant to the debate about gun rights in modern American politics. Federalism was, and still is, at the heart of the Second Amendment, and would deeply influence the eventual wording of the Second Amendment that emerged from the Constitutional Convention.

Chapter Four:

The Historical Provenance of the Second Amendment

In contemporary American politics, the Second Amendment is both lauded by supporters of the gun rights movement as a guarantee of the protection of individual liberties, and loathed by gun critics as an impediment to gun control measures. To contemporary readers, the awkward phrasing of the Second Amendment may be puzzling, as the short clause presents four ideas without explicitly articulating their connection, or how these concepts should be applied to the modern debate about guns in American politics: *A well regulated Militia*/*being necessary to the security of a free State*/*the right of the people to keep and bear Arms*/*shall not be infringed*.[170] But placed in the historical context of the ratification debates about the Constitution and the construction of the Bill of Rights, the language makes sense. The key principles of the Second Amendment – the necessity of the militia; the security of liberty; the right to bear arms; and protecting that right from infringement – reflect critical issues from the Founding, already apparent in early state constitutions that emphasized the sovereignty of the people, the fear of standing armies, and the necessity of a citizen militia as a vital political institution.

These themes, however, particularly the fear of standing armies and the importance of the citizen militia, may seem irrelevant to the modern debate about gun rights in American politics. While such concerns may be an anachronism – the state militia system has been replaced with

[170] Some commentators have suggested alternate linguistic formations to clarify the meaning of the Second Amendment. For example, former Supreme Court Justice Warren Burger suggested the insertion of "because" into the opening phrase: "[Because] a well-regulated militia [is] necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Law professor David Yassky argues that the modern version should read "a well regulated militia…shall not be infringed." The words prominently displayed on the wall of the National Rifle Association foyer simply omit the prefatory phrase, reading: "…the right of the people to keep and bear arms shall not be infringed." See Warren Burger, "The Right to Bear Arms," *Parade Magazine* (14 January 1990): 5-6; David Yassky, Brief as Amicus Curiae in *United States v. Emerson*, 270 F.3d 203, Fifth Circuit (2001); and Michael Waldman, *The Second Amendment: A Biography* (New York, NY: Simon & Schuster, 2014), 96.

the National Guard and the military is an established federal institution – examining the rationale behind its text and structure reveals a central irony of the political development of the Second Amendment:

concerns from the Founding not only established the underlying tenets of the gun rights movement, but also formalized the idea that guns must be well-regulated. In other words, while the Framers did not consider the right to keep and bear arms a distinct political issue, the question of how to balance rights and regulation underscored discussion of the Second Amendment, an issue which continues to resonate in the modern debate about gun rights in American politics. For the Framers, the best way to balance security with liberty was through a well-regulated militia; in modern American politics, resolving the tension between safety and individual liberties remains a contentious question, which may be better reconciled by understanding the historical context from which the debate emerged.

Further, analyzing the arguments behind the various drafts, and the reasoning for retaining or omitting certain phrases, makes clear that the Second Amendment was created not only to secure the right to bear arms, but as part of a broader scheme of federalism to protect the states from centralized tyranny and federal encroachment – another theme that continues to animate the current debate about gun rights. Prior to the Founding, the right to bear arms was widely understood as a civic duty, a requirement of republican government to serve in the local militia for the common defense. During the process of drafting and ratifying the Constitution and adopting the subsequent Bill of Rights, however, the meaning of the right to bear arms shifted from a required civic duty to a fundamental states' right: the right to bear arms articulated in the Second Amendment guaranteed the right of the states to arm their militias to ensure their people's liberties were protected from federal tyranny. The modern debate about gun rights in

American politics no longer focuses on the militia, but the question of how to protect the people's rights in a well-regulated federal scheme remains a salient issue, particularly the challenge of balancing gun rights with gun control. Examining the historical provenance of the Second Amendment demonstrates that the right to bear arms was firming entrenched within the context of the militia system, which, while perhaps not a concern of contemporary American politics, still reflects critical themes that continue to influence the current debate about gun rights.

The Early Militia System

Military organization under the Articles of Confederation was deliberately weak, reflecting deep suspicions of standing armies and centralized military authority. The burden of national defense was left to the states; according to Article VI of the Articles, "Every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered." Congress could only exercise military power in times of emergency, requiring a vote of nine of the thirteen colonies; beyond these provisions, the Articles mentioned neither a standing army nor a right to bear arms. [171] This arrangement was not wholly satisfactory to those concerned with national defense. George Washington, among others, advocated for a stronger national military system – a professional and disciplined militia patterned after the Continental Army with regular musters, trainings, formal dress, and standardized weapons provided by state arsenals. According to Washington:

> Every citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even his personal services to the defense of it, and

[171] Articles of Confederation, Article VI (1781).

> consequently that the Citizens of America (with a few legal and official exceptions) from 18 to 50 years of age should be borne on the Militia Rolls.[172]

For Washington, military service was considered a privileged duty, as it was "universally reputable to bear Arms and disgraceful to decline having a share in the performance of Military duties."[173] His scheme would rely on a small federal standing army and well-trained state militias to serve as reserves; while Washington's plan did not come to fruition, his recommendations would influence the military organization later established in the new Constitution.

There was also disagreement among the Framers regarding a universal militia versus select militias. For example, Anti-Federalist Federal Farmer favored a universal militia as the best arrangement to preserve the people's liberty because all eligible citizens would be equally responsible to share in militia duties: "…Substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them."[174] On the other hand, Secretary of War Henry Knox, in his *Plan for the General Arrangement of the Militia of the United States*, argued for a select militia divided by age, with a younger, highly trained elite force eventually mitigating the need for a standing army.[175] Many of these discussions remained theoretical, however. By the time the new federal government was established, the actual militia consisted

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[172] George Washington, "Sentiments on a Peace Establishment," cited in John McAuley Palmer, *Three War Statesmen: Washington, Lincoln, Wilson* (New York, NY: Doubleday, 1930), 393.
[173] George Washington, "Sentiments on a Peace Establishment," cited in John McAuley Palmer, *Three War Statesmen: Washington, Lincoln, Wilson* (New York, NY: Doubleday, 1930), 393.
[174] *Letters from the Federal Farmer to the Republican* in Herbert J. Storing, ed. *The Complete Anti-Federalist*, volume II (Chicago, IL: University of Chicago Press, 1981), 214.
[175] Henry Knox, *A Plan for the General Arrangement of the Militia of the United States* (1786), cited in Palmer, *Three War Statesmen: Washington, Lincoln, Wilson*, 84-94.

of approximately six hundred soldiers; there was no national infrastructure to organize the militia and state administration varied greatly across the nation.[176] It was soon apparent that the fragile military structure under the Articles of Confederation was insufficient to provide for public safety and national defense, evident in a series of armed rebellions that threatened the stability of the young nation.

Shays's Rebellion

The notion of armed resistance against a tyrannical government was a fundamental political principle during the American Revolution; following the war, however, the locus of tyranny shifted from England toward state governments. In August of 1786, a group of veterans in western Massachusetts, under the leadership of farmer Daniel Shays, assembled into a militia and marched to the courthouse in Northampton. During the Revolution, Massachusetts had shut down their courts to protect tax debtors from prosecution by the British authorities. When the courts reopened, many residents (most of whom had served in the war) were at risk of losing their farms due to unpaid taxes needed to fund the war debt. The rebellion was intended to prevent the courts from operating and to halt the widespread foreclosures that had plagued western farmers. Though the rebels did not have the legal authority under Massachusetts law to muster as a militia, they organized themselves as such, bearing muskets as they marched in formation. Calling themselves the Regulators, they claimed they were acting for the "good of the commonwealth" on behalf of the "Body of the People" to challenge the "tyrannical government in the Massachusetts state."[177]

[176] Russell F. Weigley, *History of the United States Army* (New York, NY: Macmillan, 1967), 89.
[177] Daniel Shays, "Letter from 16 October 1786," *Middlesex Gazette* (Concord, MA), 6 November 1786.

State governor James Bowdoin denounced the Regulators, claiming their protest was "fraught with the most fatal and pernicious consequences" and intended to "subvert all law and government."[178] More protests continued in Worcester and Great Barrington, Rhode Island, forcing Governor Bowdoin to summon the state militia to quell the uprisings, but many militia members either ignored the summons or joined the rebels. (In Great Barrington, the state militia met the mob at the courthouse, where they decided to vote on whether the court should reopen; almost eight hundred of the one thousand militia members voted with the rebels.) The rebellion was eventually quelled not by the Massachusetts state militia, but by a private military force raised by former Continental Army major general Benjamin Lincoln and troops summoned by the Continental Congress. [179] That Massachusetts was unable to suppress the uprisings with its militia made clear to the rest of the country that the states lacked sufficient authority under the Articles of Confederation to provide for their defense.

Two competing concepts of the militia emerged from Shays's Rebellion. On one hand, Shays's notion that a militia, composed of citizens ready to defend themselves against tyranny, was superior to a professional standing army enjoyed wide support; on the other hand, the refusal of the state militia to muster showed the inherent weakness of a citizen militia. This dichotomy demonstrated the central tension of the militia ideal: it was unclear if the militia was a popular institution meant to challenge the government or a tool of governmental authority to secure citizens' liberties and guarantee public safety. The Regulators firmly believed they were protecting the local people from governmental tyranny, while the state viewed them as an armed

[178] James Bowdoin, *A Proclamation* (Boston, MA), 1786.
[179] Leonard L. Richards, *Shays's Rebellion: The American Revolution's Final Battle* (Philadelphia, PA: University of Pennsylvania Press, 2002), 63-65. For a comprehensive account of Shays's Rebellion, see Robert A. Gross, ed., *In Debt to Shays: The Bicentennial of an Agrarian Rebellion* (Charlottesville, VA: University of Virginia Press, 1993).

mob. Militia legislation passed in Massachusetts following the rebellion made clear that the right to bear arms established in the state constitution did not secure the right to armed revolt. According to the Act:

> Whereas in free government, where the people have a right to keep and bear arms for the common defence, and the military power is held in subordination to the civil authority, it is necessary for the safety of the state that the virtuous citizens thereof should hold themselves in readiness, and when called upon, should exert their efforts to support the civil government and oppose attempts of factitious and wicked men who may wish to subvert the laws and constitution of their country.[180]

The Massachusetts state militia was intended to reflect the commitment to well-regulated liberty, not subversion or rebellion, with citizen-soldiers understanding their right to bear arms as tantamount to their duty to serve in the state militia. According to militia adjutant general William Donnison, "Americans have ever esteemed the right of keeping and bearing Arms, as an honorable mark of their freedom; and the Citizens of Massachusetts, have ever demonstrated how highly they prize that right, by the Constitution they have adopted, and the laws they have enacted, for the establishment of a permanent Militia…and by the honest pride they feel whenever they put on the exalted character of Citizens-Soldier."[181] Shays's Rebellion, however, revealed the challenges of achieving this ideal.

Balancing Military Authority

The reaction to Shays's Rebellion was widespread across the states, making clear the need for a more organized military scheme. George Washington and other nationalist leaders were much alarmed by the rebellion, fearing for the security and stability of the fledgling nation. (Thomas Jefferson, however, was not unduly concerned: "I hold it [that] a little rebellion now

[180] Massachusetts Legislature, *An Act for the More Speedy and Effectual Suppression of Tumults and Insurrections in the Commonwealth* (1787).
[181] William Donnison, *General Orders* (1 March) (Boston, MA: Adams and Larkin, 1794).

and then is a good thing.")[182] The militia ideal so cherished by early Americans had proved insufficient to guarantee public safety, thus the rebellion became an impetus for reforming the Articles of Confederation. As Massachusetts Supreme Court Justice Theophilus Parsons wrote, the assumption that "a sufficient number of brave, loyal, and determined citizens would always appear ready to support their government; [and] that a majority of the people would be too wise and too well informed to permit the basis of their rights and privileges to be overturned by the needy, desperate banditti" had failed.[183] In a letter to James Madison, George Washington wrote: "What stronger evidence can be given of the want of energy in our government than these disorders? If there exists not a power to check them, what security has a man for life, liberty, or property?"[184]

The question of federal military organization would be crucial to a different conception of the militia. Many leaders grudgingly accepted the idea that state militias needed to be organized under a central authority to protect the country from both internal and external threats, but the challenge remained of how to accomplish this goal without undermining state control of their militias. Part of the project of constructing a new government, then, would require rethinking the role of the military and how power would be distributed between the federal government and the states. Traditional republican political theory assumed that local militias would be closer to the people and less likely to become tyrannical – but following Shays's Rebellion, it was clear that local militias could be dangerous as well. A broad shift in perspective occurred following the insurrection that led the Framers to realize that an effective

[182] Thomas Jefferson to James Madison (30 January 1787) in Merrill Peterson, ed., *The Portable Thomas Jefferson* (New York, NY: Penguin Classics, 1975), 416-417.
[183] Theophilus Parsons to Nathaniel Tracy, n.d., in Theophilus Parsons, *Memoir of Theophilus Parsons, Chief Justice of the Supreme Judicial Court of Massachusetts* (Boston, MA: Ticknor and Fields, 1859), 128-129.
[184] George Washington to James Madison (5 November 1786) in Worthington Chauncey Ford, ed., *The Writings of Washington*, volume XI (New York: G. P. Putnam, 1889), 51-52.

central government required a national army and federal control over the state militias. With this change in thinking came a different conception of the right to bear arms: if, prior to the Founding, the right to bear arms was largely understood as a duty to serve in the local militia, then the reformed military structure created in the Constitution established the right to bear arms as a states' right. The states would be guaranteed the right to arm their militias against federal tyranny under a carefully balanced system of federalism, an issue that would underscore much of the Constitutional Convention.

The Constitutional Convention

When the Framers assembled in Philadelphia in the summer of 1787, the right to bear arms was not explicitly debated, but implicitly construed under state and federal police powers and discussed within the context of military organization. At this juncture, arms-bearing was not understood as an individual right, but under the auspices of militia service, and – if discussion of the right to bear arms was scant – according to James Madison's *Notes of Debates in the Federal Convention*, arguments concerning the militia were robust. Debate focused on whether the states would retain the authority to train their militias, the presence of a standing army in times of peace, and the preference of a select militia. The final text included in the Constitution regarding the nation's military structure attempted to balance federal and state concerns over military authority, but still left open the question of how the states would be protected from federal encroachment.

Discussion of national military organization at the Convention centered on the following provision, proposed on 21 August 1787:

> To make laws for organizing, arming, & discipling the Militia, and for governing such part of them as may be employed in the service of the U.S. reserving to the States

> respectively, the appointment of officers, and authority of training the militia according to the discipline prescribed.[185]

Roger Sherman of Connecticut considered the last phrase of the militia proposal (granting power to the states to train the militia) redundant: according to James Madison's *Notes*, "he thought it unnecessary" because "the States will have this authority of course if not given up."[186] Elbridge Gerry of Massachusetts disagreed, concerned that allowing the federal government authority to train the militia would render the states mere puppets: "This power in the U.S. as explained is making the States drill-sergeants. He had as lief let the Citizens of Massachusetts be disarmed, as to take the command from the States, and subject them to the General Legislature. It would be regarded as a system of Despotism."[187] John Langdon of New Hampshire, however, did not share the same concerns about federal tyranny and state sovereignty, considering military control to be a concurrent power:

> He could not understand the jealously expressed by some Gentlemen. The General & State governments were not enemies to each other, but different institutions for the good of the people of America. As one of the people he could say, the National Government is mine, the State government is mine. In transferring power from one to the other, I only take out of my left hand what it can not so well use, and put it into my right hand where it can be better used.[188]

Madison finally clarified the issue at hand – that a well maintained and disciplined militia was essential to the new federal arrangement – and argued that the states lacked sufficient authority to control their militias:

> The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety & the less prepare its Militia for that purpose; in like manner as the militia of a State would have

[185] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York, NY: W.W Norton, 1987), 512.
[186] Ibid., 513.
[187] Ibid.
[188] Ibid., 514.

> been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a *National* concern, and ought to be provided for in the *National* Constitution.[189]

Further, "as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia."[190] Thus, despite concerns from Gerry and others that the states lacked adequate military authority under the new scheme of federal government, the memory of Shays's Rebellion was fresh: many of the Framers acknowledged that the state militia system was flawed, given that many states failed to discipline and arm their militias. Looking back at the Convention, Gouverneur Morris of New York wrote in 1815:

> An overweening vanity leads the fond many…to believe or affect to believe, that militias can beat veteran troops in the open field and even play of battle. This idle notion, fed by vaunting demagogues, alarmed us for our country, when in the course of that time and chance…she should be at war with a great power…to rely on the militia was to lean on a broken reed.[191]

According to James Madison's *Notes*, there were also concerns about standing armies in times of peace. On 18 August 1787, Elbridge Gerry claimed that the people would have no recourse against the presence of standing armies in peacetime; referring to the government's ability to maintain a standing army, "the people were jealous on this head." Further, "an army is dangerous in time of peace & could never consent to a power to keep up an infinite number."[192] Gerry recommended that the federal government be limited to one thousand troops in peacetime, but other delegates voted against his motion. Oliver Ellsworth of Connecticut proposed a compromise: the federal standing army and the state militias would be subject to the same rules and obligations; if the states failed to adequately provide for their militias, the federal

[189] Madison, *Notes of Debates in the Federal Convention of 1787*, 514-515.
[190] Ibid., 516.
[191] Gouverneur Morris to Moss Kent (12 January 1815) in Max Farrand, ed., *The Records of the Federal Convention of 1787*, volume III (New Haven, CT: Yale University Press, 1991), 421.
[192] James Madison, *Notes of Debates in the Federal Convention of 1787*, 482.

government would do so in their stead. With such an arrangement, "the whole authority over the Militia ought be no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power."[193] Debate also focused on the creation of a select militia; Ellsworth did not have much faith in such a scheme, claiming it was impractical and "if it were not it would be followed by a ruinous declension of the great body of the Militia. The States will never submit to the same militia laws."[194]

Finding a Compromise: The Federal Army and State Militias

Most of the Framers fell in the middle of the debate, acknowledging the need for a strong national military structure but still committed to protecting the state militia system. As James Madison explained, "the regulation of the Militia naturally appertaining to the authority charged with the public defence…if the States would trust the General Government with a power over the public treasure, they would from the same consideration of necessity grant it the direction of the public force."[195] The language that eventually emerged from the Convention reflected this compromise: power was divided on both the federal and the state level; military control was split between the federal executive and legislative branches as well as divided between the federal and state governments. Article I, Section 8 of the new Constitution established a federal standing army and placed the militia under the authority of Congress, and Congress was given power to raise and support armies and a navy (and required to provide funds for both). The President would serve as commander-in-chief of the military, including the militia "when called into actual

[193] Madison, *Notes of Debates in the Federal Convention of 1787*, 483.
[194] Ibid., 484.
[195] Ibid.

Service of the United States."[196] The legislature was granted wide – but not unlimited – latitude to regulate the militia system, as Congress was required:

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[197]

Congress was limited to specific circumstances in summoning the militia: to execute the nation's laws; to suppress insurrections; and defend against invasions, leaving the states to appoint officers and train their militias.[198] The Constitution did not restrict Congress from assembling troops in times of peace, one of the most notable differences from the Articles of Confederation. Still, fears of standing armies were mitigated by the division of power that balanced executive and legislative control. As well, there were checks on federal military powers: the army was funded for two year terms; the President could not declare war; the states retained authority to regulate and train their militias; and state militias could still be used against a tyrannical federal government. In sum, this arrangement meant that while the military was under federal authority, the states retained autonomy over their militia and would work concurrently with the federal government to secure national defense and the protection of citizen liberties.

Ratification Debates

When the final draft of the Constitution was completed, it was submitted to the states for debate at their ratification conventions. George Mason's *Objections* articulated a common position among critics of the Constitution: it was neither sufficiently limited nor federal, most

[196] The United States Constitution, Article 2, Section 2, Clause I (1787).
[197] The United States Constitution, Article I, Section 8 (1787).
[198] Ibid.

evident in the lack of a bill of rights. Mason and other Anti-Federalist feared that the bills of rights already present in state constitutions would not fully protect the people's liberties, including the freedom of press, religion, trial by jury, or to safeguard the states against standing armies, and must be guaranteed in the Constitution.[199] Richard Henry Lee, also of Virginia, was concerned with similar rights, including free elections and independent judges. While it was clear that the lack of a bill of rights was of utmost concern, the right to bear arms – contrary to National Rifle Association President Charlton Heston's claim that it was the most important right debated and secured in the Bill of Rights – was not at the forefront of the dispute about rights following the Constitutional Convention.[200] Neither Mason nor Lee included the right to bear arms in their list of protected rights. Even Thomas Jefferson, more enthusiastic about arms-bearing than many of his contemporaries, did not mention the right to bear arms in his critique of the Constitution. After complementing the overall structure of the new government in a letter to James Madison, Jefferson wrote:

> I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trial by jury in all matters of fact triable by the laws of the land and not be the law of Nations.[201]

Though the specific right to bear arms was not widely discussed, Federalists and Anti-Federalists sparred over the proper arrangement of military organization, namely how the federal government and the states would balance national defense; the Anti-Federalists were deeply

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[199] George Mason, "Objections to this Constitutional Government," in Max Farrand, ed., *Records of the Federal Convention*, volume II (New Haven, CT: Yale University Press, 1974), 637-640.
[200] Robert J. Spitzer, "Door No. 1: Muskets? Or Door No, 2: Free Speech?," *Christian Science Monitor* (19 September 1997): 19.
[201] Thomas Jefferson to James Madison (20 December 1787) in Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, volume XII (Princeton, NJ: Princeton University Press, 1955), 441.

concerned with protecting the states' ability to arm their militias, implicit to which was bearing arms under the auspices of militia service.

Most of these debates, similar to those at the Convention, centered on assuaging the Anti-Federalist fear of a federal standing army by securing the states' right to maintain their militias, meaning that a specific right to bear arms was only implied in the context of these broader military concerns. Still, ratification debates about military organization, particularly the importance of state militias, would anticipate the right to bear arms later established in the Second Amendment. Luther Martin of Maryland believed that it was the states, not the federal government, that would safeguard the people's liberties, thus the states must be guaranteed the right to regulate and arm their militias: "The time may come when it shall be the *duty* of a *State*, in order to preserve itself from oppression of the general government, to have recourse to the sword."[202] Above all, the Anti-Federalist critique of the Constitution focused on state sovereignty, fearing that excessive federal control over the military would be the death of the states. As Martin cautioned: "It was urged…raising and keeping up regular troops, without limitations, the power over the Militia should be taken away from the States, and also given to the general government, it ought to be considered as the last coup de grace to the State governments…"[203] Martin was concerned that Congress could "march the whole militia of Maryland to the remotest part of the union, and keep them in service as long as they think proper" without any state recourse; they would be "subjected to military law, and tied up and

[202] Luther Martin, "Genuine Information," in Herbert J. Storing, ed., *The Complete Anti-Federalist*, volume II (Chicago, IL: University of Chicago Press, 1981), 71-72.
[203] Farrand, *Records of the Federal Convention*, 208-209.

whipped at the halbert like the meanest of slaves."[204] In language anticipating the eventual wording of the Second Amendment, John de Witt of Massachusetts claimed:

> It is asserted by the most respectable writers upon government, that a well-regulated militia, composed of the yeomanry of the country, has ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen.[205]

A Right to Bear Arms?

Anti-Federalist commentary, as well as debates from the Virginia and Pennsylvania ratifying conventions, were representative of the overall challenge of military organization, and would be highly influential to the final text of the Second Amendment. The Virginia Anti-Federalists centered their critique on the federalization of the militia, concerned that Congress could use their power to effectively disarm the states. For the Anti-Federalists, the best assurance of liberty – rather than a professional standing army – was a body of citizens trained in arms and organized into militias under civil control. George Mason feared that "Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them."[206] James Madison and other Federalists responded to this argument by reminding the Anti-Federalists that federal power over the militia was not exclusive but concurrent: the states could arm their militias if the federal government failed to do so and retained power over militia training. Still, Patrick Henry worried the proposed system would be confusing and inefficient:

> So that our militia shall have two sets of arms, double sets of regimentals, etc. and thus, at a very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms, etc.? Every one who is

[204] Luther Martin, "Genuine Information," in Storing, *The Complete Anti-Federalist*, 72.
[205] John DeWitt, "Letter to the Free Citizens of the Commonwealth of Massachusetts" (3 December 1787) in Storing, *The Complete Anti-Federalist*, volume IV, 35.
[206] George Mason, "Objections," in Jonathan Elliot, ed., *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* (Philadelphia, PA: J.P. Lippincott, 1941), 379.

> able may have a gun. But have we not learned by experience, that necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case? When this power is given up to Congress without limitation or bounds, how will your militia be armed?[207]

Similar to Madison, Federalist Richard Henry Lee defended the federal arrangement as one of enumerated powers, responding to Henry's concern that state legislatures would lack authority to arm their militias by arguing: "I cannot understand the implication of the honorable gentleman, that, because Congress may arm the militia, the states cannot do it…the states are, by no part of the plan before you, precluded from arming and discipling the militia, should Congress neglect it."[208] John Marshall finally presented a straightforward assurance: "If Congress neglect our militia we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into the hands of her militiamen?"[209] After much debate, the Virginia delegates produced a list of amendments to the Constitution that would lay the foundation for the federal Bill of Rights, including a right to bear arms:

> That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural, and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all causes the military power should be under strict subordination to and governed by the Civil power.[210]

Further, "any person religiously scrupulous of bearing arms" would be exempt from military service "upon payment of an equivalent to employ another to bear arms in his stead." The basis of the proposed amendment was not simply "that the people have a right to keep and bear arms,"

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[207] Patrick Henry, "Speech at Virginia Ratification Debate" in Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, volume III, 386.
[208] Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, volume III, 178.
[209] Ibid., 421.
[210] James Madison, "The Seventeenth Principle of the Virginia Convention," in G. Hunt and J.B. Scott, eds., *The Debates of the Federal Convention of 1787* (New York, NY: Oxford University Press, 1920), 662.

but that the states would be guaranteed the right to arm their militias, given that "the body of the people trained to arms is the proper, natural, and safe defence of a free State."[211] Virginia also proposed an alteration to the text of the Constitution, including a clarification that each state "shall have the power to provide for organizing, arming and disciplining its own Militia, whensoever Congress shall omit or neglect to provide for the same."[212]

Similar to Virginia, debate at the Pennsylvania ratification convention also centered on fears that the federal standing army would diminish the authority of the state militia. Akin to George Mason's concerns, Samuel Bryan, writing under the name Centinel, lamented that the militia clauses would "subject the citizens of these states to the most arbitrary military discipline…in the character of the militia, you may be dragged from your families and homes to any part of the continent and for any length of time, at the discretion of the future Congress…they may be made as mere machines as Prussian soldiers."[213] Anti-Federalist Robert Whitehill penned a lengthy critique of the Constitution, *The Dissent of the Pennsylvania Minority*, which included several proposed amendments that protected the right to bear arms:

> That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals…
>
> The inhabitants of the several states shall have the liberty to fowl and hunt in seasonal times.
>
> That the power of organizing, arming, and discipling the militia…remain with the individual states, and that Congress shall not have the authority to call or march any of

[211] Bernard Schwartz, ed., *The Bill of Rights: A Documentary History*, volume II (New York, NY: Chelsea House, 1971), 842.
[212] Ibid., 843.
[213] Samuel Bryan, "Letter from Centinel to the People of Pennsylvania," in Storing, *The Complete Anti-Federalist*, 159-160.

> the militia out of their own state, without the consent of such state and for such length of time only as such state shall agree.[214]

The Minority Report drew on the Pennsylvania Declaration of Rights of 1776, which protected the right to bear arms for both the defense of the state and for self-defense, as well as two separate clauses from the state constitution, the right to bear arms and the right to hunt.[215] The report was unusual in that the axiom *to bear arms* was widely understood at the time as a legal phrase to indicate arming militias for the common defense, and applying the phrase to hunting and other non-military pursuits was unconventional.[216] (Because of this unorthodox phrasing, much has been made of the Minority Report by scholars arguing for an individual rights interpretation of the Second Amendment.[217] For example, legal scholar Stephen P. Halbrook offers the following analysis of the Minority Report:

> Bearing arms to hunt was not out of place in a bill of rights, in that British authorities had been notorious for disarming the people under the guise of game laws. The above clarifies that the term "bear arms" is not linguistically restricted to matters of the militia or the national defense. Bearing arms for self-defense and hunting were proper purposes. Mention of standing armies and the subordination to the civil power in the same article did not detract from the individual character of the right guaranteed.[218]

Legal historian Patrick J. Charles disagrees, however, claiming that the usage of this phrase was "a textual anomaly," given that Pennsylvania never went on to pass constitutional statutes or common laws that connected bearing arms to non-military activity.)[219]

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[214] Robert Whitehall, "Speech, Pennsylvania Convention," in John P. Kaminski, ed., *Documentary History of the Ratification of the Constitution*, volume II (Madison, WI: Wisconsin Historical Society Press, 1976), 597-598.
[215] Pennsylvania Declaration of Rights, Article XIII (1776).
[216] See Gary Wills, "To Keep and Bear Arms," *New York Review of Books* 42 (1995), 62-73.
[217] See Don Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (1983), 204-273; and Nelson Lund, "The Ends of the Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders," *Texas Review of Law and Politics* 4 (1999), 158-191.
[218] Stephen P. Halbrook, *The Founders' Second Amendment* (Chicago, IL: Ivan R. Dee, 2008), 196.
[219] Patrick J. Charles, *The Second Amendment* (Jefferson, NC: McFarland & Company, 2009), 40.

Contemporary legal quibbling aside, it was the historical reaction to the Pennsylvania Minority Report that was more relevant to understanding the eventual wording of the Second Amendment, with Federalists largely contemptuous of the hunting provisions in Whitehall's report. Noah Webster wrote glibly:

> But to complete the list of unalienable rights, you would insert a clause in your declaration, *that every body shall, in good weather, hunt on his own land, and catch fish in rivers that are public property*. Here, Gentlemen, you must have exerted the whole force of your genius! Not even the *all-important* subject of *legislating for a world* can restrain my laughter at this clause![220]

The more serious critique of the Minority Report focused on the longstanding debate about federal control over the state militias. Federalist Tench Coxe replied to the Report by asking: "Who are these militia? Are they not ourselves?" Coxe believed that federal powers over the state militias posed little threat to the existing structure, given the commitment of the people to serve in their state militia as well as their faith in the new federal government: "Their swords, and every other terrible implement of the soldier, are the birthright of an American." Coxe argued that the Constitution did not expressly grant power to the federal government to disarm the state militias; further, well-regulated state militias would mitigate the need for a large standing army: "The militia, *who are in fact the effective part of the people at large*, will render many troops *quite unnecessary*."[221] Further, a different passage from the Minority Report summarized the overall Anti-Federalist position on the balance of federal and state authority over the militia:

> That the power of organizing, arming, and disciplining the militia (the manner of discipling the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have the authority to call or march any of the militia out of their

[220] Noah Webster, "To the Dissenting Members of the Late Convention of Pennsylvania," *Daily Advertiser* (Philadelphia, PA), 31 December 1787, 1-2.
[221] Tench Coxe, *An Examination of the Constitution of the United States of America* (Philadelphia, PA: Zachariah Poulson, 1788), 21.

> own state, without the consent of such state, and for such length of time only as such state shall agree.[222]

Such provisions demanding that the states be granted sufficient authority to arm their militias would lay the foundation for the right to bear arms established in the Bill of Rights.

The Case for the Standing Army

Despite widespread fears of the danger of standing armies, those who favored a more robust national military scheme upheld their position at the ratification conventions, arguing that a successful federal government relied on the proper balance of national and state authority. In contrast to the Anti-Federalists, Alexander Hamilton defended the necessity of a standing army, arguing that an inefficient militia could never defend itself against a professional army – since a standing army was a necessity, it would be safer for the states to provide constitutional checks on the federal government to prevent military encroachment. In *Federalist 24*, Hamilton asserted that standing armies should not be banned in times of peace because Congress needed sufficient authority to protect the nation from military threats.[223] Later, Hamilton argued that standing armies were superior to militias on the battlefield and would provide better protection against domestic insurrection. Further, the federal government needed sufficient authority to unite the state militias so they could operate effectively and uniformly: "If a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security."[224]

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[222] Robert Whitehall, "Speech, Pennsylvania Convention," in Kaminski, *Documentary History of the Ratification of the Constitution*, 598.
[223] Alexander Hamilton, "Federalist 24," in George W. Carey and James McClellan, eds., *The Federalist* (Indianapolis, IN: Liberty Fund, 2001), 117-121.
[224] Hamilton, "Federalist 25," in Carey and McClellan, *The Federalist*, 122-126; "Federalist 28," 136-139; "Federalist 29," 140.

Though he considered a general militia necessary for defense and protection, James Madison also argued for a federal standing army but reminded the states that they retained power to check the national government. In *Federalist 46*, Madison wrote: "Let a regular army, fully equal to the resources of the country, be formed, and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger."[225] Further, the standing army would be challenged by "a militia amounting to near half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence." Thus a standing army would not deprive the states their authority to arm their militias: "Besides the advantage of being armed, which the American possess over the people of almost every nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition…"[226] Though Hamilton argued that a standing army was a military requirement, while Madison considered a general militia to be adequate, they agreed that the militia clause in the Constitution would provide the necessary protections to the states against a tyrannical standing army.

The Bill of Rights

After the Constitution was ratified by the required nine states, there were still concerns about the lack of a bill of rights. The protection of individual liberties was paramount, but so to were assurances that the states would be provided authority to defend themselves with armed militias, specifically from the threat of standing armies, and more generally, from federal

[225] James Madison, "Federalist 46," in Carey and McClellan, *The Federalist*, 247.
[226] Ibid.

encroachment on state interests. Commenting on the new Constitution, Thomas Jefferson opined:

> It is a good canvas on which some strokes only want retouching…it seems pretty generally understood that this should go to Juries, Habeas corpus, Standing armies, Printing, Religion, and Monopolies…if no check can be found to keep the number of standing troops within safe bounds, while they are tolerated as far as necessary, abandon them altogether, discipline well the militia and guard the magazines with them.[227]

By the time the First Congress assembled in New York in April of 1789, James Madison had accepted the necessity of a bill of rights, not just as a matter of republican theory but also as an acquiescence to practical politics: Madison sought to quickly fulfill his promise of a bill of rights to the Anti-Federalists in case there was a call for a new constitutional convention. Madison based his proposed bill of rights on many sources, including the English Declaration of Rights, bills of rights already present in state constitutions, suggestions from the state ratifying conventions, and commentary and articles from leaders and citizens. Madison, though concerned about military matters, was largely preoccupied with specific political rights: "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases," which Madison claimed was "the most valuable amendment on the whole list."[228] Still, while other rights were paramount to the right to bear arms, Madison did not neglect the military concerns raised in the ratification debates. There were two central questions that gave rise to the Second Amendment: first, whether congressional authority over state militias could surpass that of the state governments; second, whether federal power over the standing army and the militia could be used to limit state power. As with most of the Bill of Rights, then, the Second Amendment was largely a matter of federalism, eventually granting the

[227] Thomas Jefferson to James Madison (31 July 1788) in Boyd, *The Papers of Thomas Jefferson*, volume XIII, 440.
[228] James Madison, in Schwartz, *The Bill of Rights*, volume II, 1113.

states the right to bear arms in the context of maintaining well-regulated militias as a check on federal authority.

Regarding the right to bear arms, Madison proposed the following language to the House of Representatives, based on the Virginia constitution: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[229] Madison first established the people's right to bear arms, then explained the purpose of this right – to serve in a well-regulated militia in order to provide security for a free country. Further, excusing those who are "religiously scrupulous" from service did not abdicate them completely from duty. Qualifying that military service was not required in person suggested other forms of military duty apart from arms-bearing, such as paying for a substitute to serve in the militia, a provision already present in many state constitutions.

Debate in the House of Representatives

Madison's list of amendments was publicly presented to the House of Representatives, available for public scrutiny, and subject to robust debate in the press. Tench Coxe, writing as "A Pennsylvanian," approved of Madison's proposals, claiming that, among other strengths, the right to bear arms provided the people protection against federal tyranny through arming the state militias:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as military forces which must be occasionally raised to defend our country,

[229] James Madison, "Speech in the House of Representatives" in Joseph Gales and William Seaton, eds., *Annals of Congress*, volume I (Washington, DC: Gales and Seaton, 1834), 451.

> might pervert their power to the injury of their fellow citizens, the people are confirmed…in their right to keep and bear their private arms.[230]

Still, others criticized the amendment for not granting the states sufficient recourse against a tyrannical federal government. An unsigned newspaper editorial in Pennsylvania claimed that since the proposed amendment did not "ordain, or constitutionally provide for, the establishment of a well-regulated militia," the state militia were still in danger of disarmament from the federal government.[231] Commentary on the right to bear arms was, however, minimal in comparison to the more salient concerns of the rights of religion, expression, and trial by jury, which were widely commented upon in the press.

A Select Committee of House members, one from each state, was appointed to review the amendments and subsequently changed Madison's wording regarding the right to bear arms: "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."[232] The Select Committee's edits were minor, but revealed important insights into the evolving conception of the right to bear arms. First, they rearranged the order of the amendment: they established the purpose of the amendment (*a well regulated militia, composed of the body of the people, being the best security of a free State*) prior to providing the right to bear arms; also, they went further than Madison in defining a well-regulated militia as *composed of the body of the people*. Next, they changed Madison's phrase *free country* to a *free State*. It is unclear in which sense the Committee meant "State" (referring

[230] A Pennsylvanian, "Remarks of the First Part of the Amendments to the Federal Constitution," *New-York Packet* (New York, NY), 23 June 1789, 2.
[231] Centinel, "To the People of Pennsylvania," in Storing, *The Complete Anti-Federalist*, 160.
[232] Proposed Amendments from the House of Representatives (17 August 1789), in Helen E. Veit, Kenneth R. Bowling, and Charles Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record of the First Federal Congress* (Baltimore, MD: Johns Hopkins University Press, 1991), 38.

to the government in general or the states in particular) but the prior wording indicated that a well-regulated militia was necessary to protect both. Finally, they altered the clause regarding conscientious objectors, removing Madison's phrase of *military service in person*. Given that the edited amendment established the importance of a well-regulated militia first, it is fair to assume that the Committee intended the clause regarding religious exemption to imply bearing arms in militia service and did not find it necessary to define it further.

Similar to the state ratification debates about the military clauses in the Constitution, House discussions on the right to bear arms focused mainly on securing the right of states to arm their militias. Elbridge Gerry opined:

> What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. Now it must be evident that under this provision, together with their other powers, congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever government means to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins.[233]

Overall, debate in the House regarding the right to bear arms focused on three issues: first, and most discussed, the clause pertaining to conscientious objectors; second, concerns about state standing armies; and third, a proposal to require a two-thirds vote of consent by both Houses of Congress for establishing a standing army during times of peace. First, House members feared that including the clause "but no person religiously scrupulous shall be compelled to bear arms" would grant the government too much power: the federal government could decide which groups were "religiously scrupulous" and effectively disarm them by preventing them from serving in the militia, just as King James II had done in England to prohibit Protestants from serving in the military. Elbridge Gerry cautioned, "Now I am apprehensive, sir, that this clause would give an

[233] Elbridge Gerry, "Speech in the House of Representatives," Gales and Seaton, eds., *Annals of Congress*, volume I, 778.

opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms."[234] Gerry was concerned that allowing for this provision would prevent the states from effectively arming their militias, as the federal government retained the power to declare which groups could not serve. Gerry proposed a change to the language: "The words to be altered so as to be confined to persons belonging to a religious sect scrupulous of bearing arms." Despite his fears, however, the House was not overly concerned and Gerry's proposal failed to pass.[235]

Others criticized the clause regarding conscientious objectors for different reasons. Egbert Benson of New York argued, "No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government."[236] Benson did not consider the protection for the religiously scrupulous to be a fundamental political right: it would be best to allow "the benevolence of the [state] legislature" to decide which groups would serve in the militia. Benson feared that "if this stands part of the Constitution, it will be a question before the Judiciary, on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals."[237] There was also debate as to whether conscientious objectors would be required to pay for a substitute to serve in their stead, as required by many state constitutions. Robert Sherman was concerned about the logistics of this arrangement: "It is well-known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying for an equivalent.[238] Gerry

[234] Gerry, "Speech in the House of Representatives," Gales and Seaton, *Annals of Congress*, 778.
[235] Ibid., 779.
[236] Egbert Benson, "Speech in the House of Representatives," in Gales and Seaton, *Annals of Congress*, 780.
[237] Ibid.
[238] Robert Sherman, "Speech in the House of Representatives," in Schwartz, *The Bill of Rights*, volume XI, 1108.

feared that if a substitute was not required, "a militia can never be depended on. This would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army."[239]

Second, Elbridge Gerry raised the critique that the opening clause of the amendment lacked clarity in its definition of the militia, concerned that a "well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one." Gerry's fear was that in allowing for the possibility of a standing army, the states themselves could establish standing armies. Gerry appeared to be alone in this fear (the Constitution already mandated in Article I, section 10, clause 3 that "No State shall…keep Troops or Ships of War in time of peace") and the matter was not discussed further.[240]

Finally, another proposal was debated that would require two-thirds consent by the House of Representatives and the Senate for establishing a standing army during times of peace. Erasmus Burke of South Carolina proposed:

> [Any] standing army in time of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace, but from necessity, and for security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all cases the military shall be subservient to the civil authority."[241]

Though this measure did not pass, it reiterated the original fear of standing armies that underscored the proposed amendment, the only antidote to which was a well-regulated and well-armed state militia. Despite the debates about conscientious objectors and standing armies, however, the wording of the amendment remained the same and was submitted to the Senate for review.

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[239] Elbridge Gerry, "Speech in the House of Representatives," in Schwartz, *The Bill of Rights*, 1109.
[240] Elbridge Gerry, "Speech in the House of Representatives," in Gales and Seaton, *Annals of Congress*, 780.
[241] Erasmus Burke, "Speech in the House of Representatives," in Gales and Seaton, *Annals of Congress*, 780.

Debate in the Senate

Less is known about the Senate debates regarding the Bill of Rights in general – and the Second Amendment in particular – because deliberations were conducted behind closed doors. Still, details from the *Senate Journal* and letters between Virginians John Randolph and St. George Tucker suggest that the Senate was primarily concerned with the federal military structure and establishing control over the militia rather than the right to keep and bear arms.[242] The Senate joined the House in denying a motion to restrict Congress from establish a standing army in times of peace; further, they rejected the conscientious objector clause. (As there is no record of debates on this point, it is purely speculative to explain why the Senate omitted this clause, which had sparked such debate in the House. Perhaps they shared Representative Benson's belief that such matters should be left to "the benevolence of the [state] legislature.")

The most notable change emerging from the Senate was the redefinition of the militia. The first clause of the House draft read: "A well regulated militia, composed of the body of the People, being the best security of a free state…" The Senate omitted the phrase *the body of the People*, returning the clause to Madison's original wording; in refraining from defining the composition of the militia, Congress thus retained the constitutional powers to determine who could serve in the militia. Also, rather than the militia providing *the best security of a free state*, the Senate rephrased the amendment slightly to read that a well-regulated militia was "necessary to the security of a free State." Further, the Senate considered adding a phrase defining the militia's purpose as "for the common defense." If this measure had passed, the amendment would have read: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms for the common defence shall not be infringed."

[242] See Schwartz, *The Bill of Rights*, volume II, 1147-1157.

Above all, the Senate was concerned with issues of federalism. According to Virginian John Randolph, there were Federalists in "the Senate [who] were for not allowing the militia arms" because they feared an armed populace might "stop their full Career to Tyranny and Oppression."[243] Further, it was unclear if "for the common defense" referred to both the United States *and* the states, which would raise issues about the states' ability to arm their militias against federal encroachment. If included, the phrase could be used by the federal government to prevent the states from mustering and arming their militias against threat, particularly internal insurrections. This provision did not pass, however, and again there is no record of the reasoning behind the decision. It could have been considered redundant: bearing arms in militia service was predicated on the notion of common defense, already established in many state constitutions and militia statutes. Or, as some scholars have suggested, it was in the interest of brevity, as the Senate edited almost all the House amendments. Historian Bernard Schwartz writes, "the Senate performed the important job of tightening up the language of the House version, striking out surplus wording and provisions."[244] That the phrase was not included in the final wording, however, allowed the states wide latitude in their ability to maintain and arm their militias independent of the federal government.

The Second Amendment

The final language of the Second Amendment that emerged from Congress established the right to keep and bear arms under the auspices of a well-regulated state militia system. The Senate settled on what is now the familiar text of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear

[243] John Randolph to Joseph Tucker (11 September 1789) in Cogan, ed., *The Complete Bill of Rights*, 293.
[244] Schwartz*, The Bill of Rights*, volume II, 1145.

Arms, shall not be infringed." The right of the people to keep and bear arms was directly linked to the states' authority to maintain its militia; the people were required by the Constitution to serve for national defense, and the states retained the right to regulate and arm their militias. Reflecting on the construction of the Bill of Rights, St. George Tucker of Virginia wrote of the Second Amendment that "all room for doubt, or uneasiness on the subject" of the division of federal and state militia powers was "completely removed." For Tucker, the Second Amendment guaranteed "that the power of arming the militia, not being prohibited to the states, respectively, by the constitution, was consequently reserved to them, concurrently with the federal government."[245] By serving (and bearing arms) in a well-regulated state militia, the people were thus guaranteed the ability to defend their liberties from tyranny.

While the Bill of Rights assuaged criticisms that the new Constitution was neither sufficiently limited nor federal, those worried that the states would lack recourse to protect themselves from centralized authority continued to fear that a strong federal government (including an authoritative military structure) would deny the people of their liberties. Many Anti-Federalists were concerned that the Second Amendment – and the whole of the Bill of Rights – did not provide the states adequate protection from a tyrannical federal government. Centinel criticized the Second Amendment because it did not prohibit "the absolute command vested by other sections in Congress over the militia."[246] Samuel Nasson of Maine, in a letter to his congressman criticizing the Bill of Rights, wanted "the right to keep Arms for Common and Extraordinary Occations such as to secure ourselves against the wild Beast and also to amuse us

[245] St. George Tucker, *A View of the Constitution of the United States with Selected Writings*, ed. Clyde N. Wilson (Indianapolis, IN: Liberty Fund, 1999), 214.
[246] Samuel Bryan, "Centinel Revived XXIX," *Philadelphia Independent Gazetteer* (Philadelphia, PA), 9 September 1789.

by fowling and for our Defense against a Common Enemy."[247] In rural Pennsylvania, a small band of radicals threatened to take up arms in protest of the Bill of Rights: populist leader William Petrikin threated that "our Volunteer company is very large, well armed and Equipped, parades often and exercises very well."[248] Such critiques were the minority view, however, and the Second Amendment became constitutionally binding with the passage of the Bill of Rights in 1791.

Reflecting the compromise between federal and state military authority, the Second Amendment guaranteed the right of the people to bear arms under the auspices of state militia service; Congress could not disarm the state militias, thus assuring their continual presence and providing the states with protection from federal tyranny. As Supreme Court Justice Joseph Story wrote in 1833: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers."[249] If the Anti-Federalists lost the debate over the Constitution, then their influence endured in Second Amendment, which would ultimately protect the right of the states to regulate and arm their militias through a careful balance of federalism – a guarantee to the states against federal encroachment that would serve as the organizational principle for interpreting the right to bear arms in years to come. Concerns about federalism continue to underscore the modern debate about gun rights in contemporary American politics, as well as the question of how to balance those rights with regulation. While its institutional foundation – the state militia system – no longer exists, the militia ideal so crucial to

[247] Samuel Nasson to George Thatcher (8 September 1789), in Cogan, *The Complete Bill of Rights*, 261.
[248] William Petrikin to John Nicholson (23 March 1789), in Gordon R. Denboer, ed., *Documentary History of the First Federal Elections* (Madison, WI: University of Wisconsin Press, 1990), 406.
[249] Joseph Story, *Commentaries on the Constitution of the United States*, volume III (Boston, MA: Hilliard, Gray, 1833), 746-747.

the historical provenance of the Second Amendment remains a powerful political symbol reflecting beliefs about individual liberty and the proper scope of federal government, issues that remain germane to the modern debate about gun rights in American politics.

Chapter Five:

Testing the Militia Ideal

With the formal structure of the American government established following the ratification of the federal Constitution, and the rights of the states secured under the Bill of Rights, key institutions of the new system would be challenged over the course of the transformative nineteenth century, including the traditional state militia system. The militia ideal was a powerful political symbol that would underscore the wider debate about the role of guns in American politics – even though it proved untenable to maintain in the young republic. As the organization of the militia system changed over the nineteenth century, the meaning of the right to bear arms was also transformed: what was firmly a states' right at the beginning of the century, reinforced by early gun legislation and the first court cases addressing the Second Amendment, shifted to embody a collective right of the people to keep and bear arms in the spirit of well-ordered liberty, regulated under the new National Guard system. While the issue of gun rights – understood in the contemporary context – was not always a salient political concern, the broader question of which groups, and under what circumstances, were constitutionally protected to keep and bear arms reflected wider constitutional, legal, and political issues that would lay the foundation for the debate about gun rights in American politics.

Examining how state and federal militia statutes and gun legislation evolved over this era, as well as analyzing state and federal court cases addressing the right to bear arms, reveals common themes that would be crucial to subsequent interpretations of the Second Amendment, and how these issues would come to animate the debate about gun rights in modern American politics. Considering these themes – including reconciling the problem of idealized republican political theory with practical military concerns; balancing state militias with centralized military

authority; the viability of the militia structure itself (and what bearing this would have on future interpretations of the prefatory clause of the Second Amendment); and the central tension between the states and the federal government in balancing their concurrent powers under a sustainable scheme of federalism – establishes the historical foundation of the collectivist interpretation of the Second Amendment. This interpretation, while a relatively settled issue at the time, would later be challenged in a radical departure from established norms to set the stage for an increasingly polarized debate about guns in American politics that emphasizes individual rather than collective rights.

The Role of the Militia in the Young Republic

With the ratification of the federal Constitution and the adoption of the Bill of Rights, the right to bear arms was secured as a protected constitutional right. The Second Amendment mitigated concerns that the Constitution was neither sufficiently limited nor federal, and its intended purpose – to guarantee the right of the states to arm their militias – was quickly codified into federal legislation with the passing of the Uniform Militia Act in 1792. This legislation was necessary because the state of military affairs was tenuous in the new nation: the federal government and the states shared concurrent power over the militia system, which existed uneasily alongside the small federal standing army, but the parameters of authority had yet to be defined. As Justice John Paul Stevens observed in 1990, "Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments." Stevens articulated the tension between these positions: on one hand, the threat of a standing army was "an intolerable threat to individual liberty and to the sovereignty of the separate States," but, on the other, recognized "the danger of relying on inadequately trained soldiers as

the primary means of providing for the common defense."[250] Despite new legislation intended to organize the militia, the scope of state authority over their militias remained unclear, soon to be tested in a series of armed rebellions that called the militia system itself into question.

Arming the States?

Following the ratification of the Constitution, many of the Framers and other political leaders provided commentary on the process of drafting the document and perspective on the final result, including analysis of the new military order that sought to balance the need for centralized authority with the long-standing commitment to the state militia system. Virginia judge St. George Tucker, for example, gave a series of lectures at the College of William and Mary explaining this novel system of military organization. Tucker understood the Second Amendment as a concession to those Anti-Federalists who feared the new federal government would disarm the state militias, functioning in accordance with Article I, Section 8 of the Constitution that established concurrent power over the militia to be shared between the states and the federal government. Tucker provided context for the language ultimately adopted in the Constitution regarding the structure of the military, referring to the Virginia Constitutional Convention that proposed "each state respectively should have the power to provide for organizing, arming, and disciplining its militia, whenever congress should neglect to provide for the same."[251] According to Tucker, "the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is consequently, reserved to them, concurrently with the federal government."[252] The importance of the state militia system could not be overstated: as

[250] *Perpich v. Department of Defense* (1990).
[251] St. George Tucker, *View of the Constitution of the United States with Selected Writings* (Indianapolis, IN: Liberty Fund, 1999), 214.
[252] Ibid.

Luther Martin of Maryland proclaimed, "The militia…is…the only defence and protection which the states can have for the Security of their rights against arbitrary encroachment of the general government."[253] As it had been prior to the Founding, the state militia system was predicated on the vision of citizen-soldiers organized by their states into well-regulated militias to defend the common rights and liberties of the people, as well as repel foreign invasions, suppress domestic insurrections, protect against standing armies. Still, it was unclear if the states retained sufficient authority over its militias to achieve these objectives.

The Militia Ideal

The militia ideal was a powerful political symbol for the young nation, providing an organizing principle around which the people could situate their civic duties; as well, it meant the states had recourse against federal tyranny in the constitutional guarantee that they could regulate and arm their militias. But the system itself was deeply flawed, as many of the state militias were disorganized and poorly managed, often resulting in an armed mass of undisciplined militiamen. As Justice Joseph Story later observed:

> The importance of a well regulated militia would seem so undeniable, it cannot be disguised that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[254]

For many of the Framers, the right to bear arms was aligned with the notion of a well-regulated militia regulated by the states; otherwise, the people would have no means to organize or manage

[253] Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, volume I (Philadelphia, PA: J.B. Lippinncott, 1941), 371.
[254] Joseph Story, *Commentaries on the Constitution of the United States*, volume III (New York, NY: De Capo Press, 1970), 745-746.

arms, which would pose a threat to domestic security. Rather, a well-regulated militia must be an institution carefully organized according to state and federal militia statutes, reliant both on civic virtue and proper military training. As an anonymous Boston editorial opined in 1785, "Let us either make the militia what the constitution supposes, and what the public safety requires it to be, or discard it. There can hardly be a medium. The militia must either be a well regulated body, or it will sink into a mere armed multitude."[255] Further, as Georgia Representative James Jackson articulated, all citizens retained the "privilege" to carry arms in militia service, but it was contingent upon those citizens' ability "to perfect [themselves] in the use of arms, and thus become capable of defending their country."[256] Jackson's remark made clear that beyond the philosophical foundation of well-ordered liberty to a republican government, there were also practical concerns about proper training and uniformity of arms. As James Wilson of Pennsylvania cautioned:

> I believe any gentleman, who possesses military experience, will inform you that men without a uniformity of arms, accoutrements, and discipline, are no more than a mob; that, in the field instead of assisting, they interfere with one another. If one drops his musket, and his companion unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States.[257]

The desire to perfect the militia system led to the passage of the Uniform Militia Act of 1792, which provided the states with further authority to arm their militias, as well as specific requirements regarding how they were to fulfill their military obligations. Examining the text of the legislation provides insight into how the Framers envisioned a well-regulated militia – the historical basis of the Second Amendment – and how the militia would be organized according

[255] *The Independent Chronicle and Universal Advertiser* (Boston, MA), 3 November 1785.
[256] House of Representatives of the United States, 17 December 1790, reprinted in *The Pennsylvania Packet and Daily Advertiser* (Pennsylvania, PA), 21 December 1790, 2.
[257] Elliot, *The Debates in the Several State Conventions*, vol. 2, 521.

to the concurrent military powers of the federal and state governments. Further, such legislation, understood in the context of the newly minted Constitution and Bill of Rights, reinforced the Framers' conception of the right to keep and bear arms as a distinct right of the states, an interpretation that would soon be codified by the courts, and endure for the rest of the nineteenth century.

Organizing a New American Militia

The challenge of establishing military structure in the young republic reflected broader tensions between the militia ideal and the practical security concerns of a vulnerable nation, as well as what role the militia should play: was it an institution regulated by the states to protect its liberties, or a popular tool of the people to express their grievances against the government? Further, military organization needed to mitigate the broader challenge of how to balance concurrent military authority between the states and the federal government. The Constitution provided in Article I, section 8, clause 16 that the federal government had plenary power to arm and organize the federal militia, while the states retained the authority to arm and organize their militias "as prescribed by Congress;" the Second Amendment supplemented these formal military powers by establishing the right of the states to arm their militias under a balanced scheme of federalism. In the next step to clarify military arrangements in the new nation, the Uniform Militia Act granted the states wide latitude as to how they would organize and arm their militias in order to fulfill their constitutional mandate. According to Pennsylvania Representative Thomas Hartley, "Our intention, in establishing a militia, is to be constantly provided with a sufficient force, to repel invasion, to suppress insurrection, to keep peace on our

frontiers…to make it serve as a nursey for training our youth…[to] enable them to render those essential services to their country."[258]

Discussion of the Uniform Militia Act in the House of Representatives reflected earlier debates about the military clauses in the Constitution, focusing on concerns that the states lacked sufficient authority over their militias. Some Representatives questioned the validity of establishing any federal legislation associated with the state militia system; as John Francis Mercer of Maryland cautioned: "It is a dangerous precedent, that we are about to establish – better let the powers remain with those states, where there is already a militia established under proper limitations, and where the liberties of the citizens are not endangered because of the circumscribed powers of those states."[259] But others suggested a more moderate approach. James Madison had earlier explained that "arming…the Militia" (as described in Article I, Section 8) meant that Congress defined the uniformity of arms and did "not extend to furnishing arms; nor the term 'discipling' to penalties."[260] Roger Sherman of Connecticut reminded the House that the federal government did not have exclusive power of arming the national militia: "What relates to arming and discipling [the militia], means nothing more than the general regulation in respect to arms and accoutrements."[261] Further, it was the "privilege of every citizen, and one of his most essential rights, to bear arms, and to resist attack upon his liberty or property, but whomsoever made."[262] The issues that emerged from the debate made clear that

[258] House of Representatives of the United States, 24 December 1790, reprinted in *The Federal Gazette and Philadelphia Advertiser* (Philadelphia, PA), 8 January 1791, 2.
[259] House of Representatives of the United States, 6 March 1792, reprinted in *The Mail; or Claypoole's Daily Advertiser* (Philadelphia, PA), 9 March 1792, 3.
[260] Elliot, *The Debates in the Several State Conventions*, volume II, 464-465.
[261] House of Representatives of the United States, 16 December 1790, reprinted in *American Mercury* (Hartford, CT), 3 January 1791, 2.
[262] House of Representatives of the United States, 17 December 1790, reprinted in *The Pennsylvania Packet and Daily Advertiser* (Philadelphia, PA), 21 December 1790, 2.

greater precision was necessary: Congress required broad militia membership but had to be certain that citizen-soldiers were capable of effective military service; citizens must respect military laws and submit to the discipline of the militia to ensure they were not simply an armed mob; and uniformity of arms was essential to an effective and well-regulated militia. As John Lawrence of New York summarized, "If the proper idea be that, that all citizens who are capable of rendering personal service, are included in the general term 'militia' – and if to 'organize' that militia, be to form it into particular bodies for particular uses, it is the duty of Congress to consider what measures, in this respect will be productive of the *greatest public benefit*."[263]

The Militia Acts

As a result, the Militia Acts of 1792 were organized into two sections: the Uniform Militia Act established the parameters of militia organization, and the Calling Forth Act specified the circumstances under which the militia could be mustered. The Uniform Militia Act was effectively a universal draft that required "each and every free able-bodied white male citizen" between the ages of eighteen and forty-five to enroll in their state militia. Militia members were also required to provide their own military grade guns and accoutrements:

> Every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball…and shall appear so armed, accoutered and provided, when called out to exercise.[264]

Further, Congress established a registry to account for privately owned weapons allocated for militia use (called a "return"). While these guns were held by individuals, they were not, per se,

[263] House of Representatives of the United States, 24 December 1790, reprinted in *The Federal Gazette and Philadelphia Daily Advertiser* (Philadelphia, PA), 3 January 1791, 2.
[264] The Uniform Militia Act of 1792 (1792).

private property because of their military purpose; citizens were required to keep these arms "exempted from all suits, distresses, executions or sales, for debt or for payment of taxes."[265] Finally, militia officers were tasked with cataloguing weapons and reporting them to the federal government. In sum, the Act granted wide organizational latitude to the states: they could establish their own service requirements and exemptions; they could levy fines or other sanctions against those who failed to muster or provide sufficient equipment; and they could determine if individual militias would be established.

The second piece of legislation, the Calling Forth Act, was added in 1795 to address the question of under what circumstances the militia could be summoned. The Constitution (Article II, Section 2, clause 1) established the President as "Commander in Chief…of the Militia of the several States, when called into the actual Service of the United States" but it had not been determined how this power would function in practice. On one hand, the First Congress feared the potential for executive excess in exerting authority over the militia but, on the other hand, worried about national safety in the instance of rebellion or invasion. There were also concerns, following a series of armed uprisings, that the states would use their militias to act against the federal government. The Calling Forth Act granted the President, in times of danger or invasion, the authority "to call forth such number of the militia of the state, or states…as he may judge necessary to repel such invasion, and to issue his orders for that purpose…" The President's power was tempered, however, by the requirement to seek approval from a federal judge prior to summoning the militia; further, the Act stipulated that while the states controlled their militias, they were still bound to their federal military obligations.[266]

[265] The Calling Forth Act (1795).
[266] Ibid.

The Limitations of the Militia Ideal

Despite the structure provided by the Militia Acts to establish the parameters of militia organization and to balance the concurrent powers of the federal and state governments, the well-regulated militia envisioned by the First Congress failed to come to fruition. As Justice John Paul Stevens observed, "Congress was authorized both to raise and support a national Army and also to organize 'the Militia'…but in the early years of the Republic, Congress did neither."[267] Many states struggled to fulfill their obligations, particularly in providing their militias with adequate arms. Congress refused to act in response, claiming that the Constitution deemed the states in charge of organizing and arming their militias. (Congress had previously passed The Arms for the Militia Act, which provided 30,000 stands of arms to be distributed throughout the country, but this concession proved to be inadequate.)[268] Thomas Pickering, an experienced Massachusetts politician – who also served as Captain of the Essex County militia in the Revolutionary War – later admired the Militia Acts for protecting state militias from standing armies and providing for the national defense, but noted that the Acts ultimately failed to meet their objectives: "'A well disciplined militia' is a hackneyed theme; and is familiarly talked of, as the proper defence of a free people: but such a militia…has never existed."[269]

As well, the militia envisioned by the Framers was already an anachronism; with the growth of the nation, it proved impossible to discipline such a large group of citizen-soldiers into uniform state military organizations. Thomas Pickering went on to criticize the current militia system as expensive to maintain, inefficient, and unnecessary:

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[267] *Perpich v. Department of Defense* (1990).
[268] The Arms for the Militia Act (1789).
[269] Letter from Timothy Pickering to James Lloyd (20 December 1822), Historical Manuscript Collection, Society of the Cincinnati (Washington, DC).

> The [militia] now established by Congress and the several states if the values of the time confirmed by militia musters be calculated, is extremely expensive; and yet, except in its organization, wholly inefficient. When the inhabitants of several Colonies were few in number, the necessity of the case, particularly in reference to their savage neighbors, required that every man should be armed, and held ready for immediate service. With our present population, such a necessity no longer exists.[270]

As Representative Aedanus Burke of South Carolina presciently warned, "The time may come that it will be disreputable to be seen in the militia…the service will become irksome, and disagreeable to those who are to bear the whole burden; and the whole system will fall into disuse."[271] Despite the inadequacies of the Militia Acts, however, the militia system remained intact and the states were required to provide for the defense and security of their people. Further, it served as an important political symbol, an organizing principle around which the people could define their collective political duties and establish their position as republican citizens within the federal scheme of government.

A Right to Armed Rebellion?

The tensions inherent to the militia system would escalate in a series of armed rebellions that would reveal the central problem of republican government: was the militia an institution regulated by the states to protect liberty, or a popular tool of the people to express grievances against the government? Understood together, Article I, Section 8 of the Constitution, the Second Amendment, and the Militia Acts established the parameters of military organization in the new nation, implicit to which was the right to bear arms. At this point, however, the boundaries of arms-bearing had not been tested: if the Second Amendment granted power to the

[270] Letter from Timothy Pickering to James Lloyd (20 December 1822), Historical Manuscript Collection, Society of the Cincinnati (Washington, DC).
[271] House of Representatives of the United States, 22 December 1790, reprinted in *The Daily Advertiser* (New York, NY), 6 January 1791.

states to arm their militias, could those militias be used against their own government? Further, the Second Amendment was intended to protect the states from federal encroachment – and, by extension, to protect the collective body of the people from tyranny – but what, precisely, constituted tyranny? America's revolutionary heritage was a troublesome legacy in the nation's early years. Theoretically, the need for armed rebellion was negated by a new constitutional system with formal processes designed to address grievances, as all political means should be exhausted prior to the gun being raised. Given that the right of revolution was a cherished political principle, however, many Federalists worried about outbreaks of dangerous rebellions in response to political discord. As Pennsylvania judge Alexander Addison cautioned, "if one law is repealed, at the call of armed men, government is destroyed: no law will have any force."[272]

While the Framers were committed to the principle that the people have recourse against a tyrannical government, many feared that a right to armed rebellion would destroy the new political system by undermining the stability of constitutional order. Scholar William Pitt Smith warned that such a right was dangerous to the newly established government and unnecessary given its formal constitutional structure: "A Convention in arms, supposes a people disorganized, or just emerging from a state of nature lately assumed, and claiming the rights of freemen."[273] James Madison unequivocally asserted that armed rebellions must be suppressed and the militia, rather than a standing army, should fulfill this duty:

> This could be done only two ways; either by regular forces, or by the people. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed to suppress and repel them, rather than a standing army. The best way to do these things, was to put the militia

[272] Alexander Addison, *Charges to the Grand Juries of the Counties of the Fifth Circuit in the State of Philadelphia* (Philadelphia, PA: John Colerick, 1800), 101.
[273] William Pitt Smith, *Observations on Conventions, Made in a Tammanial Debate* (New York, NY: Tammany Society, 1793), 3.

> on good and sure footing, and enable the Government to make use of their services when necessary.[274]

Favoring the militia over a standing army to suppress rebellions, however, assumed that the militia would fulfill its duty to quell the crisis, which, given the experiences of Shays's Rebellion and other uprisings, was hardly a given. These questions soon moved beyond theoretical debate to become a legitimate political crisis in western Pennsylvania.

Challenging the Federal Government: The Pennsylvania Militia

Similar to many states following the Revolutionary War, Pennsylvania raised taxes as part of a federal economic scheme to fund the nation's debt and charter a national bank. Local whiskey distillers, in particular, were taxed heavily and began to antagonize excise collectors. In 1794, a group of protestors marched to the home of tax collector John Neville, who fired on the crowd when they refused to disband; the angry mob soon organized itself into a formal rebellion, assembling with arms to protest the government tax policy. In response, President Washington selected a group of federal representatives to negotiate with the rebels.[275] Washington also called forth the militia, seeking a Supreme Court injunction to deem the rebellion "too powerful to be suppressed by the ordinary course of judicial proceedings."[276] While some members of Congress cautioned President Washington against using force in response to the armed rebellion, Alexander Hamilton approved: "There can therefore be no such thing as a 'constitutional resistance' to laws constitutionally enacted."[277] Others criticized the rebels for effectively undermining the authority of American constitutionalism – peaceful protest was legitimate, but

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[274] Elliot, *The Debates in the Several State Conventions*, volume III, 378.
[275] For a general account of the Whiskey Rebellion, see Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York, NY: Oxford University Press, 1988).
[276] George Washington, cited in Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of a Military Establishment in America, 1783-1802* (New York, NY: Free Press, 1975), 161.
[277] Alexander Hamilton to George Washington, 2 September 1794 in Harold Syrett, ed., *The Papers of Alexander Hamilton*, volume XVII (New York, NY: Columbia University Press, 1961-1987), 187.

not armed rebellion. Even former Anti-Federalist William Findley could not support the rebels, reasoning that proper citizens understood that "if they permitted government to be violently opposed, even in the execution of an obnoxious law, the same spirit would naturally lead to the destruction of all security and order." The rebels were not legitimate protestors but merely "armed banditti."[278]

What is the Militia?

Similar to Shays's Rebellion, two competing notions of the militia emerged from the Pennsylvania crisis: a militia organized and regulated by the state in contrast to a spontaneous assembly meant to guard popular liberty from governmental tyranny. The protesters adopted the trappings of militia organization to justify their actions; according to rebel leaders, they were "assembling in arms" to protect "the virtuous principles of republican liberty."[279] Anti-Federalist William Petrikin supported the rebels: "All revolutions began by force and that it was as well it should begin…it was time there should be a Revolution – that Congress ought either to Repeal the Law or allow these people to set up a government for themselves – and be separated from us."[280] Another problem which arose from the rebellion reflected broader issues of the unsettled nature of the militia system: if the federal government responded to force with force, there was the possibility that the militia would fail to muster or – similar to Shays's Rebellion – join the protestors. Secretary of State Edmund Randolph feared not only that the Pennsylvania militia would refuse to assemble, but that "if the militia of other States are to be called forth, it is not a

[278] William Findley, *A History of Insurrection in the Four Western Counties* (Philadelphia, PA: Samuel Harrison Smith, 1796), 177.
[279] Hugh Henry Brackenridge, *Incidents of the Insurrection in the Western Parts of Pennsylvania* (Philadelphia, PA: John McCulloch, 1795), 40.
[280] Testimony of Robert Whitehall, 11 October 1794 in *The Rawle Family Papers*, volume I, Historical Society of Pennsylvania, 119.

decided thing that many of them may not refuse."[281] Eventually, the rebellion was quelled and its leaders brought to trial, an outcome that enjoyed wide public support. The Governor of Pennsylvania, Thomas Mifflin, denounced the rebellion and commanded the state militia to follow orders: "The oath of affirmation of every public officer, and the duty of every private citizen" meant that laws "cannot be disobeyed, or obstructed, or resisted." Armed rebellion was not a legitimate means of protest; laws could be "amended if they are imperfect, or they may be repealed if they are pernicious."[282]

The result of the Whiskey Rebellion reinforced a stronger state militia system closer to the federal model advanced by George Washington and Alexander Hamilton. A new vision of the militia emerged that required greater reciprocity between the states with the federal government: participation in the militia required citizen-soldiers to protect *against* rebellions, not to propagate them. Samuel Kendal, a minister from Massachusetts, wrote that the people's will must be appropriately expressed through constitutional means: "There cannot exist any reason, or cause, which will justify the rising of a part of the people in arms against a government…which is supported by the will of the majority, and may at any time to altered by the same will; especially as there are constitutional means for the redress of any grievances, resulting from its administration."[283] Further, the crisis shed new light on the right to bear arms established in the Second Amendment. An anonymous commentator opined, "The late insurrection in the western counties and the alacrity of the militia, in rising for its suppression,

[281] Edmund Randolph to George Washington, 7 August 1794 in Francis Wharton, ed., *State Trials of the United States* (Philadelphia, PA: Carey and Hart, 1849), 157.
[282] Address of Governor Mifflin to the Militia of Lancaster, 26 September 1794, *Pennsylvania Archives* 4: 312.
[283] Samuel Kendal, *A Sermon Delivered on the Day of National Thanksgiving, 19 February 1795* (Boston, MA: Samuel Hall, 1795), 28-29.

demonstrate the propriety of a free people keeping arms in their own hands."[284] In other words, the Second Amendment's guarantee that the states have authority to arm their militias meant that those militias were required to keep and bear arms in the name of collective duty and public safety, not as a means to armed rebellion.

Balancing State and Federal Authority Over the Militia

While the Whiskey Rebellion clarified the role of the state militias in the new federal system – aligning the states with, rather than opposed to, the national government in military matters – it remained unclear how much autonomy the states retained over their militias. The Constitution provided plenary power for the states to train their militias, including the time, place, and nature of training. Also, the states were entitled to determine how arms would be employed in military service; which arms were required for service; and whether fines would be levied for those who failed to muster. Still, the division of authority over the militia between the federal government and the states remained ambiguous. The Supreme Court addressed this issue in *Houston v. Moore* (1820), which questioned whether the states could hold court-marital tribunals or if this power fell under the jurisdiction of the federal courts. The opinion was divided, with the majority arguing that Congress did not grant exclusive jurisdiction to the federal courts on militia matters, thus upholding the state law. The majority held that a Pennsylvania militia law that required fines for nonattendance to militia trainings did not violate the Constitution or preempt federal legislation; the Court reaffirmed that the federal government and the states shared concurrent jurisdiction to regulate the militia. Writing for the majority, Justice Bushrod Washington argued:

[284] Anonymous, "The Late Insurrection in the Western Counties," *Washington Spy* (Washington, DC), 26 December 1794.

> The power of the State governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not being prohibited by the instrument, it remains with the States, subordinate nevertheless to the paramount laws of the general government, operating on the same subject. Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, [it] has thus excluded the power of legislation by the States on these subjects.[285]

Justice William Johnson, in a concurring opinion, reiterated the role the states must play in controlling the militia: "Extensive as [Congress's] power over the militia is, the United States are obviously intended to be made in some measure dependent upon the States for the aid of this species of force." Still, the Supreme Court acknowledged that military organization was a weak point in the Constitution, with Justice Washington admitting that the structure of the militia system had not been "formed with as much wisdom as, in the opinion of some, it might have been, or as time and experience may hereafter suggest."[286]

Justice Joseph Story, in a dissenting opinion, argued for more sweeping federal control over the states while still respecting the states' concurrent power to organize their militias. Justice Story claimed that once the federal government legislated on a military matter, the states were subordinate to federal authority; in this case, since the defendant had violated a federal law but was tried in a state court-martial tribunal, Justice Story argued that Pennsylvania lacked jurisdiction to hold such trials and was beholden to federal legislation. Justice Story also invoked the Second Amendment for the first time, though demurring that it "may not, perhaps, be thought to have any important bearing" on the matter at hand. He noted that the Second Amendment had been included in the Bill of Rights as a concession to the Anti-Federalist fear that "congress should refuse to provide for arming or organizing them," meaning "the states

[285] *Houston v. Moore* (1820).
[286] Ibid.

would be utterly without a means of defense, and prostrate at the feet of the national government."[287] While Justice Story argued that the federal government retained control over the militia, he qualified his position to acknowledge that federal power was limited and the states were permitted authority over their militias:

> Congress has power to provide for organizing, arming, and discipling the militia; and it is presumable, that the framers of the constitution contemplated a full exercise of these powers. Nevertheless, if Congress had declined to exercise them, it was competent to the State governments to provide for organizing, arming, and discipling their respective militia, in such manner as they might think proper.[288]

For Justice Story, the Second Amendment "confirms and illustrates" that the states retained concurrent power over the militia "rather than impugns," but it did not change the Constitution's assertion that the federal government was the ultimate authority over militia matters.

The Decline of the State Militia System

While the Supreme Court made clear that the states retained control of their militias, the structure remained unsettled, leaving open the question of the proper balance of state and federal authority. The militia system, guided by the military provisions in the Constitution and the Militia Acts, was formally established to provide for security and national defense, but often fell short of expectations. While some states tried to meet the terms of the Militia Acts, most failed to achieve its mandates. For example, providing weapons was required under the Uniform Militia Act, but most states either ignored this provision, or, in those states that did set aside funds to provide for militia weapons, often neglected to provide them. Congress was forced to intervene, purchasing 30,000 weapons in 1789 and passing legislation to allocate $200,000 annually to fund state militias.[289] As time passed and the United States faced its first military

[287] *Houston v. Moore* (1820).
[288] Ibid.
[289] The Arms for the Militia Act (1789).

challenges, it became clear that the militia system was inherently flawed. The War of 1812 demonstrated the fragilities of the militia: many northern states refused to summon their militias in response to the crisis; the states that did assemble their militias were ineffective against British troops, who easily overtook them and, in a show of aggression, eventually burned the White House. Admiral John Morison described the militia's poor performance: "For five days the British army marched along the banks of the Patuxent, approaching the capital of the United States without seeing an enemy or firing a shot." Later, "after the militia had suffered only 66 casualties they broke and ran…some [British] officers arrived in time to eat a dinner at the White House that had been prepared for the President and Mrs. Madison."[290]

Further, the federal standing army – that institution so repugnant to the Framers – proved itself to be more effective in actual warfare, evident in its triumph over the British at Niagara Falls in 1814. As Henry Adams recalled, it "was the only occasion during the war when equal bodies of regular troops met face to face…and never again after that combat was an Army of American regulars beaten by British troops."[291] This elevated the authority of the regular army over the disorganized state militias, establishing a pattern that would persist for the rest of the century: while the standing army remained small (between 6,000 and 27,000 troops, given the military necessity), it was the foundation of national defense and security.[292] Meanwhile, the state militia system persisted, but without effective results. Abraham Lincoln recounted a witty memory of the militia musters of his younger days, describing a convivial but undisciplined scene: "Among the rules and regulations, no man is to wear more than five pounds of cod-fish

[290] Samuel Eliot Morison, *The Growth of the American Republic* (New York, NY: Oxford University Press, 1969), 377.
[291] Henry Adams, *The War of 1812* (New York, NY: Rowman & Littlefield, 1999), 179.
[292] Russell F. Weigley, *History of the United States Army* (Indianapolis, IN: University of Indiana Press, 1984), 597-598.

for epaulets, or more than thirty yards of bologna sausages for a sash; and no two men are to dress alike, and if any two should dress alike the one that dresses most alike is to be fined."[293] Levity aside, it was clear that the traditional militia system required systemic change in order to be an efficient military force.

Adapting the Militia Model to New Challenges

With the traditional state militia system in decline, a new form of military organization emerged in the Jacksonian era. Volunteer militia companies were established by citizen-soldiers who served on a part-time basis, making a point to differentiate themselves from the universal militia established under the Uniform Militia Act by adopting greater discipline and formality in contrast to the ill-trained states militias. Though formed as independent organizations, these companies were soon regulated by the state where they were based and later absorbed into the state military apparatus. Some of these volunteer companies were more civic-minded than militaristic, functioning primarily as social clubs for similar religious or ethnic groups; other corps, however, trained vigorously and proudly displayed their own military-grade arms. (It was volunteer militia companies that protected the nation's capital when the Civil War commenced, allowing the government time to organize its regular soldiers.) The rise of volunteer militia companies presented a sharp rebuke to the disorganized and inefficient state militia system, and set the stage for broader institutional changes to the national military structure.[294]

The onset of the Civil War changed military organization dramatically, given that it was the first time in United States history that the mass mobilization of troops was necessary. More

[293] Abraham Lincoln, "Speech to the Springfield Scott Club, 14 August 1852," in Roy P. Basler, ed. *The Collected Works of Abraham Lincoln* (New York, NY: Rutgers University Press, 1953), 149-150.
[294] Marcus Cunliffe, *Soldiers and Civilians: The Martial Spirit in America, 1775-1865* (New York, NY: Little, Brown, 1968), 220-222.

volunteer units were quickly established by the states and consolidated under the federal government once the Union Army was established. With the onset of the war, there was much confusion about the balance between the states and the federal government in military matters, but the federal government quickly asserted itself as the ultimate authority over both the state militias and the national army; for instance, all arms used in the Union Army were furnished by the federal government.[295] In 1862, Congress amended the Uniform Militia Act to increase the President's authority over the militia: the President now possessed sweeping power to intervene in state governments when they failed to fulfill their obligation to the federal government to provide well-regulated troops. The President could require a time of service (up to nine months) when summoning the state militia and retained absolute power to issue statutes for states that lacked effective militia laws.[296] In 1863, the Enrollment Act was enacted, which functioned as the first federal draft. The Act granted Congress the "power to raise and support armies" and required all able-bodied male citizens between twenty and forty-five to enlist. (In practice, the Act was largely unnecessary because most soldiers volunteered; only six percent of Union soldiers were drafted. Many of the volunteers were African American men living in Union territory, most of whom enrolled directly in the federal corps rather than state units.)[297] Still, the Act further weakened the state militia system of old and placed the federal government firmly in control of military matters.

The Roots of the National Guard

Following the Civil War, the regular army was demobilized, and military organization returned to state militias and volunteer units. During Reconstruction, state governments began

[295] Weigley, *History of the United States Army*, 203-204.
[296] Ibid., 207-208.
[297] Ibid.

organizing official volunteer units following internal unrest, many of which were more formal and disciplined corps distinct from the old militia.[298] These groups consciously styled themselves as "national guards," a role formalized in 1878 with the formation of the National Guard Association. This group, established by militia officers from various states, sought recognition and funding from the federal and state governments to provide for the common defense. Many state legislatures passed statutes that declared national guard units the only legitimate form of militia, a position that would be sanctioned by the Supreme Court in *Presser v. State of Illinois* (1886), which allowed the states to prohibit parades of armed "militia" members and held that arms-bearing was only permitted for well-regulated militia units. Congress responded to the shift toward the national guard model by increasing federal funding to the state militias before finally federalizing the militia system into the National Guard with the Militia Act of 1903.[299]

The shift toward the national guard model reflected the desire for greater military organization and professionalization; as well, it was a response to changing technical requirements in military service as arms-bearing became more challenging. In response to such concerns, the National Rifle Association was founded in 1871 to provide instruction and practice for these more technically complicated weapons. The NRA aimed to guide young men, "particularly the wholesome, rural, native-born, nonunionized type," and was inspired by the ideals of sportsmanship and civic duty. [300] The NRA sought to teach its trainees not only correct marksmanship, but also required disciplined training and knowledge of guns, in case these young

[298] Weigley, *History of the United States Army*, 211-213.
[299] Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities* (New York: Cambridge University Press, 1982), 104-105. For a detailed account of the history of the National Guard, see Chapter Six of this dissertation.
[300] H. Richard Uviller and William G. Merkel, "Muting the Second Amendment," in Carl T. Bogus, ed. *The Second Amendment in Law and History* (New York: The New Press, 2000), 166.

men were suddenly summoned to fulfill their military duty.[301] Such goals harkened back to the traditional republican notion of the well-regulated armed populace, reliant on a virtuous citizenry trained in arms and ready to fight for their country. Now, however, the republican yeoman was replaced with a more modern citizen-soldier prepared to serve both his state and federal government.

Responding to Change: The Right to Bear Arms in the State Courts

While the nineteenth century saw the decline of the traditional state militia system, the *image* of the militia remained a powerful political symbol in American politics, representing the commitment to well-ordered liberty under a republican government. That the reality of the militia system failed to meet its ideal, however, presented broad implications for interpreting the Second Amendment, first tested in the state courts. The text of the amendment referred to a specific institution – the state militia. But as that system broke down over the century, it was unclear if the militia envisioned by the Framers retained sufficient authority to justify the premise of the Second Amendment: the states were guaranteed the right to arm the people in well-regulated militias, but was the constitutional protection of the Second Amendment still applicable given the weakening of the militia system? In response to changing militia statutes, as well as state laws regulating firearms, the courts would be tasked with answering this question.

According to nineteenth century state court rulings, the Second Amendment's safeguard of the states' right to arm their militias held, but this right was qualified by increased regulation as weapons became more ubiquitous outside the context of militia service. Over the course of the nineteenth century, the courts established what jurist Joel Prentiss Bishop termed in 1873 the

[301] For a general history of the National Rifle Association, see James E. Serven, ed. *Americans and Their Guns: The National Rifle Association Story Through Nearly a Century of Service to the Nation* (New York: Stackpole Books, 1967).

"Arkansas Doctrine," which asserted that only those weapons necessary to a well-regulated state militia were constitutionally protected. Any weapons deemed outside of militia service, such as those "employed in quarrels, brawls, and fights between maddened individuals," were subject to state regulation.[302] Kentucky was the first state to ban concealed weapons in 1813 (including firearms, knives, and swords) under the auspices of state regulatory powers, legislation that was quickly adopted by other states. Louisiana passed a similar ban on concealed weapons to protect public safety: crimes involving violence from concealed weapons "have of late been of such frequent occurrences as to become a subject of serious alarm to the peaceable and well disposed habitants of the state."[303] In subsequent years, Georgia, Virginia, Alabama, and Ohio adopted similar restrictions on concealed weapons. These early examples of regional gun regulation demonstrate the efficacy – then and now – of state mandated gun policies that allow localities to response to their citizens' needs and provide examples for nearby states for innovative laws.

Other states adopted what historians refer to as the "Massachusetts Model," which referenced a Massachusetts law that prohibited people from carrying weapons in public places.[304] While the Massachusetts Model limited the carriage of dangerous weapons to common areas, it allowed an exemption for self-defense: as a similar Texas ordinance described, if an individual could prove an imminent threat "such a nature as to alarm a person of ordinary courage, and that such a weapon so carried was borne openly," open carriage was permissible.[305] Despite this exception, however, most states limited how and where weapons were allowed, reflecting a

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[302] Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* (Boston, MA: Little, Brown, and Company, 1873), 498.
[303] "An Act to Prevent persons in this Commonwealth from wearing concealed Arms, except in certain cases," *Acts Passed at the First Session of the Twenty-First General Assembly for the Commonwealth of Kentucky* (1813).
[304] See Saul Cornell, "The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities," *Fordham Urban Law Journal* 39 (2012): 1695, 1719-26.
[305] "Chapter XLII: Weapons," *Charter and Revised Ordinances of the City of Galveston* (Galveston, TX: Book and Job Establishment, 1875), 283.

widely held belief that "under a government of laws, a man has no right to carry an armory in his pocket, and to walk among his fellow citizens equipped like a brigand."[306] If the purpose of republican government was to protect the people from tyranny, such laws were meant to ensure public safety and freedom from external threat, with the right to bear arms understood within the context of well-ordered liberty. These laws, while reasonable, would soon be subject to judicial scrutiny.

The First Challenges to Gun Regulation

The constitutionality of state laws banning concealed weapons was first addressed in Kentucky in *Bliss v. Commonwealth* (1822). The weapon in question was a sword concealed in a cane; defendants argued that the law violated the Second Constitution of Kentucky, which declared "the right of the citizens to bear arms in defence of themselves and the state, shall not be questioned."[307] The state Supreme Court overturned the lower court's ruling that upheld the law, arguing that the right to bear arms was a fully protected constitutional right and exempt from state regulation. The reasoning behind this decision, however, was more a reflection of the state's commitment to the superiority of its constitution rather than a definitive position on the right to bear arms. The Court argued that the state constitution's protection of the right to bear arms limited any prohibitive legislation, claiming that "any restraint on the right, immaterial what appellation may be given to the act, whether it be an act regulating the manner of bearing arms or any other, the consequence, in reference to the constitution, is precisely the same, and its collision with that instrument equally obvious." For the Kentucky Supreme Court, constitutional

[306] "Deadly Weapons," *North American and the United States Gazette* (Philadelphia, PA), 22 May 1854.
[307] The Second Constitution of Kentucky, Article X, Section 2 (1799).

protections were sacrosanct, as such rights were "absolutes without any limits short of the moral power of the citizens to exercise it."[308]

The decision was not well-received within the state, nor did it set a precedent for subsequent state cases testing the constitutionality of concealed carriage laws. The Kentucky House of Representatives presented a formal rebuttal of the decision, reminding the Court that the right to bear arms was not a right to personal self-defense, but a guarantee that the federal government could not disarm the state militia. Further, the right to bear arms was properly understood only within the notion of a well-regulated militia: "The term 'to bear arms' is in common parlance, even at this day, most usually and most appropriately applied only to the distinctive arms of the soldier, such as a musket or rifle."[309] (Kentucky later amended its state constitution to allow the legislature to regulate concealed weapons, thus rendering *Bliss* a moot point, but it is still an notable outlier in early cases regarding the right to bear arms.)[310]

Following *Bliss*, other states heard cases regarding bans on concealed weapons, establishing a precedent that interpreted the right to bear arms in the context of state militia service. The first of these cases, *Aymette v. State* (1840), involved the constitutionality of a Tennessee law prohibiting the concealed carry of bowie knives (or "Arkansas toothpicks"). Referencing the historical opposition to standing armies, the Court asserted that the right to bear arms was intended "for [the people's] common defense to vindicate their rights." Bearing arms in the participation in the militia, they argued, was the only constitutionally protected activity: "A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day…it would never

[308] *Bliss v. Commonwealth*, 12 KY (1822).
[309] *Journal of the Kentucky House of Representatives* (Frankfort, KY, 1837), 73-75.
[310] Robert Ireland, "The Problem of Concealed Weapons in 19th Century Kentucky," *Register of the Kentucky Historical Society* 91 (1993): 370-85.

be said of him, that he had borne arms, much less could it be said, that a private citizen bear arms, because he has a dirk, or pistol concealed under his clothes, or a spear in a cane."[311] While militia weapons were protected under the state constitution, the Court granted the state broad powers of regulation to determine how such weapons should be kept and carried.

In a similar case, the constitutionality of Arkansas's ban on carrying concealed weapons was challenged in *State v. Buzzard* (1842). The state Supreme Court upheld the law, arguing that both the state and federal constitutions protected rights "essential to the enjoyment of well-regulated liberty." Not only was the Second Amendment intended to protect arms-bearing in relation to the state militia, but it was well within the state's police powers to regulate accordingly. Further, the Court made clear that the Second Amendment did not protect an individual's right to bear arms for self-defense: the state constitution did not "enable each member of the community to protect and defend by individual force his private rights against every illegal invasion." Rather, the right to bear arms was intended to "enable the militia to discharge."[312]

Not long after, Georgia heard a similar case considering the constitutionality of state laws regulating the carriage of weapons, which resulted in a slightly different outcome. The Georgia Supreme Court ruled in *Nunn v. State* (1846) that while the state had the right to prohibit the concealed carriage of dangerous weapons, it could not regulate open carriage. This was the first case since *Bliss* that overturned a state law regulating the right to bear arms. Further, it made an enthusiastic defense for the individual right to bear arms – though in the context of militia service: "The right of the whole people, old and young, men, women, and boys, and not militia

[311] *Aymette v. State*, 4 TN (1840).
[312] *State v. Buzzard*, 4 AR (1842).

only, to keep and bear arms of every description, and not merely as are used by the militia, shall not be infringed, curtailed, and broken in upon…and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of the free State."[313]

The Georgia Supreme Court revisited the question of state gun regulation *Hill v. State* (1874) twenty eight years later, this time evaluating an 1870 law that prohibited carrying "any kind of deadly weapon, to any court of justice, or any election ground or precinct, or any place of public worship, or any other public gathering…except militia muster grounds."[314] The Court reversed its position in *Nunn*, arguing that the right to bear arms could not interfere with other protected rights, such as the rights to assemble peacefully, to vote, and to worship. The Court viewed the right to bear arms distinct from other political rights, claiming – if it were to be considered the same as other political rights – that society would descend into anarchy and "the people, instead of depending upon the laws and the public authorities for protection, were each man to take care of himself, and to be always ready to resist to the death, then and there, all opposers."[315] The Missouri Supreme Court reached a similar verdict in *State v. Reando* (1878), arguing that the right to bear arms was subject to state regulation in the spirit of public safety and order. Judge Elijah Norton explained: "The right to keep and bear arms necessarily implies the right to use them, and yet acts passed by the legislature regulating their use, or rather making it an offense to use them in certain ways and places, have never been questioned."[316]

[313] *Nunn v. State*, 1 GA (1846).
[314] *Hill v. State*, 52 GA (1874).
[315] Ibid.
[316] "The Supreme Court: On Carrying Concealed Weapons," *State Journal* (Jefferson City, MO), 12 April 1878, 2.

Thus over the course of the nineteenth century, the state courts interpreted the right to bear arms as the right of the people to bear arms in the service of the state militia, subject to reasonable regulation. The prevalence of gun ownership outside of militia service, however, meant that the states needed to balance arms-bearing with public safety and well-regulated liberty, an issue that would come to frame the future debate about gun rights in American politics. Even in the rough terrain of Texas, the state court asserted that firearm regulation was an essential protection of liberty: "It is useless to talk about personal liberty being infringed by laws such as that under consideration. The world has seen too much licentiousness cloaked under the name of natural or personal liberty; natural and personal liberty are exchanged, under the social compact of the states, for civil liberty."[317] As Michigan Supreme Court Justice Thomas M. Cooley summarized in 1879:

> Neither military nor civil law can take from the citizen the right to bear arms for the common defense. This is an inherited and traditionary right, guaranteed also by the State and federal Constitutions. But it extends no further than to keep and bear those arms which are suited and proper for the general defense of the community against invasion and oppression, and it does not include the carrying of such weapons as are specially suited for deadly encounters.[318]

Though the state courts varied slightly in their interpretation of the right to bear arms, the general legal principle established in these cases placed the people's right to bear arms within the context of a well-regulated militia subject to state oversight, a view that would prevail until the increasingly contentious politics of gun rights changed the course of legal discourse.

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[317] *English v. State*, 35 TX (1872).
[318] Thomas M. Cooley, *A Treatise on the Law of Torts: Or the Wrongs Which Arise Independent of Contract* (Chicago, IL: Callaghan, 1879), 301.

The Question of Incorporation

While the state courts considered the constitutionality of local gun laws, it was unclear if the Supreme Court could incorporate the Second Amendment against the states, a legal issue that would become politically salient during the Civil War and its aftermath, and would set the stage for later debates about the scope of gun rights in American politics. The Civil War dramatically changed the role of the militia in the United States, and at this critical juncture came a shift in interpreting the Second Amendment. When the South Carolina militia fired shots on the Union Army in 1861, fears that a state might use their militia against the federal army came to fruition. With Union triumph, state militias were placed firmly within federal control, but the scope of the right to bear arms – how arms were regulated; who could possess those arms; and for what purpose – was unclear. Further, the Second Amendment became a distinctly political issue for the first time as Democrats and Republicans sought to establish competing constitutional agendas following the Civil War, sowing the seeds for the modern partisan debate about gun rights in American politics. The Democrats maintained the traditional states' right interpretation of the Second Amendment, arguing that the states must be protected from federal encroachment; meanwhile, the Republicans looked to expand federal power, in part to force southern states to guarantee rights – including the right to bear arms – to all its citizens.[319]

Many northern Republicans, for example, were angered by southern "black codes" that systemically denied Freemen of their political and civic rights, including the right to bear arms in service of the state militia. Criticizing those southern states that limited the privileges and immunities of their citizens during Reconstruction, Ohio Congressman John Bingham declared

[319] For a general treatment of Civil War politics, see James McPherson, *Battle Cry of Freedom: The Civil War Era* (New York, NY: Oxford University Press, 1988). For an overall narrative of Reconstruction, see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York, NY: Harper Collins, 1988).

in 1871, "The freedom of speech was abridged, the freedom of the press was abridged, the freedom of conscience was abridged, the right of the people to peacefully assemble was abridged, the equal right of the citizen to vote at all elections was abridged, and finally, the right to bear arms for the Union and the Constitution was abridged and prohibited by State laws."[320] For example, Mississippi issued a law that prohibited "freedmen, free negro, or mulatto, not in the military service of the United States Government, and not licensed to do so by the board of police in his or her county" from keeping and bearing arms. Despite these exceptions (military service or police approval), the Mississippi militia used this statute to effectively disarm all Freedmen; according to a 1866 report, the militia "have seized every gun and pistol found in the hand of the (so called) freedmen…they claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms."[321] Such measures were particularly onerous because many Freedmen disarmed by these laws were Civil War veterans; further, they had been provided weapons by the federal government with the intention of serving in their state militias upon homecoming. The South Carolina Colored Convention (operating in a state that not only disarmed Freedmen but also denied them the right to serve in the militia) declared these laws were "a plain violation of the Constitution, and unjust to many of us in the *highest degree*, who have been soldiers, and purchased our muskets from the United States Government when mustered out of the service."[322]

[320] "Speech of the Hon. John A. Bingham," *Cincinnati Daily Gazette* (Cincinnati, OH), 15 September 1871.
[321] Edward McPherson, *The Political History of the United States during the Period of Reconstruction* (Washington, D.C.: Philp & Solomons, 1875), 32-35.
[322] "Address of Colored South Carolinians," *Philadelphia Inquirer* (Philadelphia, PA), 30 November 1865.

The Politics of the Second Amendment

At this juncture, the right to bear arms, long accepted as a states' right to organize and arm its militia, was now politically contentious for the first time: did the Second Amendment give the states the right to systematically disarm certain groups of citizens under their authority to regulate their militias, and how would this influence partisan politics? According to many northern Republicans, the right to bear arms in the South had become egregiously misinterpreted to allow states to disarm the newly freed slaves. A Philadelphia newspaper opined in 1866, "The Constitution says that the right of the people to bear arms shall never be impaired; yet the whole black race of the south has been disarmed and placed at the mercy of the rebels."[323] In response to such grievances, Congress passed the Civil Rights Act of 1866, which included "the constitutional right to bear arms…enjoyed by all the citizens of such State or district without respect to race or color" and later, the Fourteenth Amendment.[324]

The Fourteenth Amendment gave constitutional authority to the federal government to protect individual rights from the states and required the states to treat their citizens equally:

> All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Due Process and Equal Protection Clauses declared that the state could not deprive "any person" of their rights, which raised questions about whether the state legislatures retained the

[323] "The Constitution as It Is," *North American and United States Gazette* (Philadelphia, PA), 13 November 1866.
[324] For the text of the Civil Rights Act as well as the extension of the Freedman's Bureau, see Abraham E.B. Treat, ed., *Key-Notes of Liberty: Compromising the Most Important Speeches, Proclamations, and Acts of Congress (1866)*, (New York, NY: Kessinger, 2010). For further analysis of the Fourteenth Amendment, the process of incorporation, and its application to the Second Amendment, see Chapter Ten of this dissertation.

right to regulate arms-bearing: if the federal government had established the right to bear arms in the federal Constitution, were the states permitted to regulate this right in light of the Fourteenth Amendment? Further, if the federal government had the power to force the states to adopt the Bill of Rights, in what capacity were individual citizens permitted to bear arms under the Second Amendment? Radical Republicans argued that the Fourteenth Amendment was intended, in part, to allow Freedmen to be armed: liberated slaves needed to either protect themselves from hostile state militias or be permitted to join them. John Bingham, a key drafter of the Fourteenth Amendment, argued in a 1871 speech that the Fourteenth Amendment meant that "the right to bear arms for the Union and the Constitution was [no longer] abridged and prohibited by State laws."[325] Some Republicans, concerned about violence, advocated the disbandment of the state militia system entirely in favor of a federal police force. Democrats challenged this expansion of federal authority and maintained a states' right position that would allow the states to regulate arms-bearing accordingly, fearing that the Republicans would increase federal authority so extensively that the states would be virtually powerless.[326]

The Right to Bear Arms Under the Fourteenth Amendment

Following the Civil War, the question of incorporation – whether the federal Bill of Rights applied to the states – became particularly relevant to how the Second Amendment was interpreted and applied to post-war politics. Prior to the Fourteenth Amendment, the Constitution provided few options if the states violated the Bill of Rights, as Congress lacked authority in the federal courts to appeal such grievances. Now, the Fourteenth Amendment assured federal recourse against any state that deprived its citizens of their rights, including the

[325] "Speech of the Hon. John A. Bingham," *Cincinnati Daily Gazette* (Cincinnati, OH), 15 September 1871.
[326] *Congressional Globe*, 39th Congress, 1st Session (1866).

right to bear arms: if a state prohibited certain groups from serving in the militia or bearing arms, those citizens deprived of their rights could seek redress in federal court. Jurists considered whether the Fourteenth Amendment changed the traditional understanding of the Second Amendment as a states' right to arm their militias, or if it would alter how states regulated weapons under their police powers. There was broad consensus at the time that states were allowed to both arms their citizens (for militia duty) and restrict arms (for public safety).[327] For example, John Norton Pomeroy, dean of New York University Law School, argued that the Second Amendment was based on the premise of a well-regulated militia and that while "government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms…this constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons."[328] Under the Arkansas Doctrine, established in *State v. Buzzard*, only those arms necessary to a well-regulated militia were fully protected under the Second Amendment; the states retained authority under their police power to regulate other weapons. For legal scholars, the Fourteenth Amendment did not change this arrangement. John Bingham summarized the intention of the Fourteenth Amendment not as a federal tactic to deny the states their authority – including the power to regulate their militias – but was merely a requirement that the states treat their citizens equally: "It is a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured without every State of this Union…it takes from no State any right which hereto pertained to the several States of the United States."[329]

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[327] See John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (New York, NY: Hurd & Houghton, 1868), 152-153; Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* (Boston, Little Brown, 1873) 494-498; and Calvin Townsend, *Analysis of Civil Government* (New York, NY: Ivison, Phinney, Blakeman & Co., 1869), 224.
[328] Pomeroy, *An Introduction to the Constitutional Law of the United States*, 152-153.
[329] John A. Bingham, "The Constitutional Amendment," *Cincinnati Commercial* (Cincinnati, OH), 27 August 1866.

The theory of incorporation became a political concern in South Carolina in 1870, setting the stage for what would become a broader debate about federalism. In response to increased violence that posited racially divided militias against one another, Republicans in Congress proposed a temporary ban on all Southern militias, claiming these "militias" were nothing more than armed rebels. Southern Democrats protested, claiming that such legislation was a direct violation of the Second Amendment; Senator Willard Saulsbury of Delaware argued that Congress clearly could not "disarm the militia of the State, or destroy the militia of a State."[330] The measure passed but did not have the intended effect: violence continued to increase and Congress recognized the need for an established state militia system to ensure public safety. The new militia system welcomed (and subsequently armed) Freedman, which resulted in the refusal of many white men to serve. Tensions escalated in South Carolina during a series of altercations between the Ku Klux Klan and the state militia, which included many Freedmen. Democrats accused South Carolina's governor, Robert Scott, of provoking violence by arming the "negro militia" while Republicans blamed the Klan for the tensions, who were nothing more than "organized bands of armed and disguised men."[331]

In response to the violence, Congress enacted the Enforcement Acts, which, among other provisions, granted the President the use of military power to suppress violence and granted wide latitude to the federal government to prosecute suspected offenders.[332] In *United States v. Mitchell* (1871), the federal government argued that the Klan had violated the Second Amendment by seizing guns furnished to the militia by the state of South Carolina; further, the

[330] Willard Saulsbury, *Congressional Globe*, 39th Congress, 1st Session (19 February 1866).
[331] United States Congress, *Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States* (1872), 540-545.
[332] The Enforcement Acts (1870-1871).

brutal intimidation and murder of militia captain Jim Williams deprived Williams his constitutional right to bear arms.[333] United States Attorney Daniel Corbin argued that the Second Amendment was now binding to the states: the Fourteenth Amendment overturned the precedent set in *Barron v. Baltimore* (1833), which held that the federal Bill of Rights did not apply to the states. According to Corbin, the Fourteenth Amendment "changes all that theory, and lays the same restrictions upon the States that before lay upon the Congress of the United States" and that the Klan had clearly violated the Second Amendment:

> Imagine, if you like – but we have not to draw on the imagination for the facts – a militia company, organized in York County, and a combination and conspiracy to rob the people of their arms, and to prevent them from keeping and bearing arms furnished to them by the State Government. Is not that a conspiracy to defeat the right of the citizens, secured by the Constitution of the United States, and guaranteed by the Fourteenth amendment?[334]

The defense understood the Fourteenth Amendment differently, asserting a narrow states' right interpretation of both the Second and the Fourteenth Amendments. Defense attorney Henry Stanbery argued that the right to bear arms was not one of the "privileges and immunities of citizens" secured by the Fourteenth Amendment, which was merely "a restriction upon Congress."[335] Co-counsel Reverdy Johnson declared that the Second Amendment was properly understood as a states' right: in times of crisis, the state retained broad latitude to regulate its militia and were free to decide "whether any particular class should be permitted to bear arms, and every other class denied the privilege."[336] The defense eventually turned away from the question of the Second Amendment and focused instead on the common law right to self-

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[333] *United States v. Mitchell,* 209 F.3d 319 (Fourth Circuit, 1871).
[334] Daniel Corbin, "Opening Statement," *The Case of Robert Hays Mitchell* in *Proceedings in the Ku Klux Klan Trials at Columbia, SC* (Columbia, SC: Republican Printing, 1872), 147-148.
[335] Henry Stanbery, "Speech of Henry Stanbery," Ibid., 146-147.
[336] Reverdy Johnson, "Speech of Reverdy Johnson," *The Case of Robert Hays Mitchell* in *Proceedings in the Ku Klux Klan Trials at Columbia, SC*, 150-151.

defense, inverting the argument: Klansmen were acting in self-defense against the "negro militia" that was determined to disarm *them*; Corbin also set aside his Second Amendment claims to argue that it was Captain Williams and his militia who acted in self-defense. Still, he pushed the Court to consider the proper scope of the Second Amendment, asserting: "We are waiting the decision of the Court on the count as to the right of bearing arms," to which Judge Bond responded, "The Court is not ready to give you an opinion on that subject now."[337]

Protecting States' Rights: The Second Amendment in Federal Courts

While the question of incorporating the Second Amendment against the states remained a legal debate among jurists, the dominant interpretation that emerged in the political sphere reflected the traditional understanding of the right to bear arms as a states' right to arm their militias. Scholar John Forrest Dillon argued that the Fourteenth Amendment did not fundamentally change the meaning of the Second Amendment: "Every state has the power to regulate the bearing of arms in such a manner as it may see fit, or to restrain it altogether." Further, "there would seem to remain no doubt that if the question should ever arise in that court it would be held that the Second Amendment of the federal constitution is restrictive upon the general government merely and not upon the states."[338] Dillon's words would soon be tested by the highest federal court.

The United States Supreme Court ruled on the issue of incorporation and the right to bear arms in 1876, holding in *U.S. v. Cruikshank* that the Fourteenth Amendment's Privileges and Immunities clause did not incorporate the Second Amendment against the states. This was the

[337] Daniel Corbin, "Speech of Daniel Corbin," Ibid., 151-152. The outcome of the case was eventually settled on the premise of the First Amendment, not the Second Amendment. Robert Hayes Mitchell, one of the Klansmen accused of Williams's murder, was convicted on the grounds that he violated Williams's right to vote, which was clearly protected as a privilege of citizenship under the Fourteenth Amendment.
[338] John Forrest Dillon and S.D. Thompson, "The Right to Keep and Bear Arms for Private and Public Defense," *Central Law Journal* 1 (1874): 296.

first case in which the Supreme Court directly addressed the meaning of the Second Amendment, as well as a test case for the theory of incorporation under the Fourteenth Amendment. *Cruikshank* arose from a violent conflict in Louisiana, the Colfax Massacre, in which a contested election resulted in racially divided groups of armed citizens storming the courthouse in Colfax. The standoff escalated as a group of white men fired on black citizens attempting to vote in protest of the election; as many as one hundred black men died and the violence was not quelled until federal troops arrived the following day.[339] The charges brought against the perpetrators of the massacre included violations of the federal Enforcement Act of 1870, which asserted in Section Six that it was a felony to "injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." In response, the defense argued that the federal government lacked jurisdiction to prosecute the accused and questioned the constitutionality of the Enforcement Act.

United States v. Cruikshank centered on the charge that the defendants had violated the federal Enforcement Act by denying black citizens the right to vote, "well knowing the said citizens to be well qualified and entitled to vote at any such election."[340] The Second Amendment was relevant because in denying the black citizens their right to vote, the accused also meant to "prevent and hinder" other rights, including the right to bear arms:

> Several and respective free exercise and enjoyment of each, every, all and singular the several rights and privileges granted or secured to the said [Nelson] and the said [Tillman] in common with other good citizens of the said United States by the Constitution and the laws of the United States of America, contrary to the form.[341]

[339] Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank* (Kansas: University of Kansas Press, 2001), 43-46.
[340] Phillip B. Kurland and Gerhard Casper, eds., *Landmark Briefs and Arguments of the Supreme Court of the United States*, volume VII (Washington, DC: University Publications of America, 1975), 289.
[341] Ibid.

In other words, the Supreme Court was tasked with determining if the defendants denied the right of black citizens to vote and if, in doing so, subsequently prevented them from exercising other rights, such as the right to peacefully assemble; the right to bear arms; and the right to life and liberty.

The Court overturned the former conviction of the defendants, arguing that first, neither the First Amendment nor the Second Amendment applied to individuals or state governments, but merely restricted the federal government from infringing upon those rights; and second, that the Fourteenth Amendment applied not to individual actions, but to state governments. If the defendants had violated the rights of black citizens, they should be tried under state law, not federal statutes. The Court articulated the dual nature of citizenship under the federal system:

> The Government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States.[342]

On the question of the Second Amendment, the Court first clarified the "right to bear arms" as both a common-law right and a constitutional right: while states could determine the common-law right of "bearing arms for lawful purposes," the Second Amendment only protected bearing arms in the service of a well-regulated militia; the Second Amendment was "one of the amendments that has no other effect than to restrict the powers of the national government." Adhering to the traditional states-rights position established in the lower courts, the majority reiterated that the Second Amendment was intended to protect the states from federal encroachment (such as disarming their militias) and the states were free to regulate arms-bearing accordingly – though, in light of the Fourteenth Amendment, those laws must not be

[342] *United States v. Cruikshank* (1876).

discriminatory. Thus the defendants, even if they had violated the black voters' right to bear arms, were not restricted by the Second Amendment in doing so:

> The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any many dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of those amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the right it recognizes…"to merely municipal legislation, or what was, perhaps, more properly called internal police."[343]

By interpreting the Second Amendment as simply a guarantee that the states were protected from federal encroachment, *Cruikshank* affirmed the traditional states' right position on the Second Amendment and limited the federal government from disbanding state militias.

Sanctioning the Militia Model

While the Supreme Court's ruling on incorporation was straightforward – the Second Amendment did not apply to the states – the majority did not elaborate a more precise interpretation of the Second Amendment beyond limiting federal authority. There was, however, more detail regarding the right to bear arms in the briefs filed on behalf of the defendants, which provided a decidedly militia-centric understanding of the Second Amendment. For example, attorney David S. Byron argued that "the power to regulate and control the bearing of arms on the part of the people, and their assembling together in great numbers" (presumably referring to militia musters) "belongs to the police authority of the State." Further, "it has been said that 'a man who carries his arms openly, and for his own protection, or for any other lawful purpose, has a clear right to do so, as to carry his own watch or hat'" but this right is not guaranteed by the

[343] *United States v. Cruikshank* (1876).

Constitution; it "is a matter to be regulated and controlled by the State."[344] Other briefs made the unequivocal case that the right to bear arms was only constitutionally protected under the auspices of state militia service; for example, attorney R.H. Marr wrote, "the right which the people intended to have secured beyond the power of infringement of Congress, is the right to keep and bear arms for the purpose of maintaining, in the States, a well regulated militia, acknowledged in this article to be necessary to the security of a free State."[345] Finally, in language that largely anticipated the Supreme Court's majority opinion, attorney John A. Campbell claimed that the right to bear arms "is not a right derived from or secured by the Constitution of the United States" and the Second Amendment "relates to the organization and equipment of the militia."[346]

The Supreme Court reaffirmed its position that the Second Amendment protected the states' authority to arm their militias ten years later. In *Presser v. State of Illinois* (1886), the Supreme Court upheld an Illinois state law prohibiting private military groups from parading or drilling without first obtaining a license. *Presser* reiterated two points crucial to *Cruikshank*: first, that the right to bear arms was protected only in connection to militia service, regulated by the states and the federal government; and second, that the Second Amendment did not apply to the states:

> It was so held by this court in the case of *U.S. v. Cruikshank*, in which the chief justice, in delivering the judgment of the court, said that the right of the people to keep and bear arms is not a right granted by the constitution. Neither is it in any manner dependent on

[344] Byron was referring to Judge William Woods's earlier circuit court ruling in *Cruikshank*, who made a robust case for the individual right to bear arms "for any other lawful purpose." Woods was an outlier in his view that the Second Amendment protected all modes of arms-bearing and his position was not included in Attorney General Amos Akerman's case against the defendants. See "Charge of Hon. W.B. Woods," *The United States v. William J. Cruikshank et al., Report of the Select Committee on the Portion of the President's Message*, in Phillip B. Kurland and Gerhard Casper, eds*., Landmark Briefs and Arguments of the Supreme Court of the United States*, volume VII, 861, 325-326.
[345] Ibid., 352.
[346] Ibid., 386-387.

> that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.[347]

Further, the Court provided a comprehensive definition of the militia, asserting that private citizens did not have the right to organize militias independent of state or federal authority, as "military organization and military drill and parade under arms are subjects especially under the control of the government of every country." *Presser* thus affirmed that the states had plenary authority over training their militias, but that did not mean the states could deprive their citizens the right to bear arms as part of a well-regulated militia:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.[348]

"The people," however, must be well-regulated and organized by the state, thus state laws that prohibited "bodies of men to associate together as military organizations or to drill or parade with arms" did not "infringe on the right of the people to keep and bear arms."[349] The Court reiterated its position that the states were entitled to regulate weapons as part of establishing a well-regulated militia in *Miller v. Texas* (1894); in reasoning similar to *Cruikshank* and *Presser*, the Supreme Court ruled that a Texas law restricting the carrying of dangerous weapons did not violate the Second Amendment and reiterated that the Second Amendment did not apply to the states.

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[347] *Presser v. Illinois* (1886).
[348] Ibid.
[349] Ibid.

The Right of the People

The courts sanctioned a states' right position on the Second Amendment that would remain binding until the Supreme Court's landmark decision in *District of Columbia v. Heller* (2008), establishing a legal precedent that would frame the debate about gun rights in the years to come. It was changes outside of the courts, however – specifically the federalization of the state militia system – that would ultimately the shift the debate about gun rights into a more contentious political issue. Over the course of the nineteenth century, the dominant understanding of the Second Amendment articulated by state and federal legislatures, as well as state and federal courts, established the right to keep and bear arms as a states' right to arm their militias; this interpretation, while straightforward, was not without political complications. If the militia ideal could be achieved – the states organizing and arming their people into a well-regulated militias committed to republican principles and common defense – than the Second Amendment would function as the Framers intended: a guarantee that the states had recourse against federal encroachment. But developments throughout the century demonstrated the limitations of that ideal, as armed rebellions, politicized militias, and racial violence in the name of states' right called into question whether the states could be trusted to arm their militias to protect, rather than infringe, the people's rights.

Despite these challenges, however, the right to bear arms was still understood at the end of the century within a balanced scheme of federalism that protected the states' right to arm their people as part of a well-regulated militia: the federal government could not disarm the state militias and the states retained the right to discipline their militias and regulate firearms. With the notion of a well-regulated militia in decline, however, a strict states' right reading of the Second Amendment proved untenable. "The right of the people" to bear arms had traditionally

been understood under the auspices of the state militia system. Soon, however, a different notion of the right to bear arms would emerge that viewed "the people" not merely as well-regulated militiamen, but as a collective political body committed to well-regulated liberty. With this interpretative change came the broader political concerns of which people, under what circumstances, and under whose authority, were constitutionally permitted to keep and bear arms – questions that would shape the changing debate about gun control in subsequent years, and continue to underscore how the issue of gun rights is debated and resolved in contemporary American politics.

Chapter Six:

The Federalization of the State Militia System

The Second Amendment is predicated on the notion that the militia is necessary to the security of a free state, thus the people are guaranteed the right to keep and bear arms. Despite political and social changes over the nineteenth century that challenged the viability of the state militia system, the militia ideal so cherished to the Framers persisted; in particular, the image of the citizen-soldier retained the traditional role of republican guardian of state and nation even as the political context evolved over time. General John A. Logan described the post-Civil War citizen-soldier as uniquely American in character: "Away off in the wilds of America a soldier had been found totally different from any that had ever walked a battlefield. Upon one day he was a citizen, quietly following the plow; upon the next he became a soldier, knowing no fear and carrying a whole destroying battery in his trusted rifle." He was committed to protecting his family and his country, uniting the roles of loyal citizen and brave soldier to embody "the discipline of an educated soldier but he fought with the desperation of a lion at bay."[350] In the contemporary debate about gun rights in American politics, the militia ideal remains a powerful political symbol, particularly to gun rights activists who venerate the nation's revolutionary heritage as a justification for the sweeping protection of gun rights. Thus the image of the armed citizen-solider serving in the militia is still relevant to American politics – even as the state militia model drastically changed following the Civil War – and remains a fundamental organizing principle to interpreting the Second Amendment and applying it to the modern issue of guns in America.

[350] John A. Logan, *The Volunteer Soldier of America* (Chicago, IL: Chicago R.S. Peale and Company, 1887), 78, 105.

It is necessary, however, to separate the militia ideal from the practical concerns of military organization, an issue that would become increasingly salient at this critical juncture in American political development, and would come to frame the future debate about guns in American politics. The right to bear arms, traditionally understood as the right of the states to arm their militias, was complicated by a key institutional change at the turn of the twentieth century – the federalization of the state militia system. The reordering of the militia system presented new challenges to interpreting the Second Amendment; with the disappearance of the state militia system, the meaning of the Second Amendment became unclear: was the right to bear arms still constitutionally protected without a militia system, the institutional foundation upon which it was based? The uncertain nature of the right to bear arms, the meaning of its proper scope, and to whom it applied, raised further political questions about the parameters of arms-bearing, including whether citizens were now able to claim an individual right to armed resistance or self-defense. Reconciling the meaning of the Second Amendment *without* a state militia system, and how this interpretative shift would come influence the politics of gun control, is crucial to understanding the increasingly contentious debate about gun rights in American politics.

Challenges to the State Militia System

Following Reconstruction, the fragmented state militia system was gradually reorganized into "national guard" units, founded on the old state militias as well as newly formed volunteer companies established to provide security and protection. The impetus for this change originated at the state level; by 1896, only three states had not reorganized their militias into National Guard units. Between the end of the Civil War and 1906, governors mustered their National Guard units 481 times, primarily to intervene in political and domestic disorders, such as racial

altercations, industrial strikes, and political demonstrations. Many Guard units were called to quell state-specific disputes: for example, the territory of Washington used the Guards to ease anti-Chinese tensions; the Utah Guards were summoned to protect Mormons; and Illinois Guards mitigated labor and immigration disputes.[351] Such incidents demonstrated the difference between a professional standing army and a citizen militia, which was still the preferred model of military organization despite its flaws. Following a 1877 railroad strike in Pittsburgh, for example, Major General Alfred Pearson observed that a citizen militia was the best reflection of the people's collective will: "Meeting an enemy on the field of battle, you go there to kill…But here you had men with fathers and brothers and relatives mingled in the crowd of rioters. The sympathy of the people, the sympathy of the troops, my own sympathy was with the strikers. We all felt that these men were not receiving enough wages."[352]

Major General Pearson's reflections, however, revealed the fundamental problem of citizen militias evident in earlier rebellions – how to guarantee military discipline, and, during rebellions, to assure that the militia did not join the resisters, as occurred in Shays's Rebellion and the Whiskey Rebellion. The railway strikes of 1877 were a catalyst to modernize and federalize the National Guard system as problems of enforcement became apparent. Many state Guard units were inadequately funded and poorly trained; as a result, private companies often supplemented state Guard units, ensuring that their interests were protected. For example, the Pennsylvania National Guard was largely subsidized by private companies between 1879 and 1900, including the Pennsylvania Railroad, which purchased weapons, built armories, and organized training camps. Due to the involvement of private business, the states gradually lost

[351] John K. Mahon, *History of the Militia and the National Guard* (New York, NY: Macmillan, 1983), 114-115.
[352] Cited in Robert V. Brice, *1877: The Year of Violence* (New York, NY: Bobbs-Merill, 1959), 143.

control over their Guard units; further, Guards were beholden to protect the concerns of their benefactors, not necessarily their state. The Pullman Strike of 1894 reflected this tension: when regular troops and Illinois Guardsmen were called to quell violence stemming from the strike, Guards fired into the crowd and injured almost thirty people, leading to the accusation that the Guards intensified rather than mollified the violence.[353]

Changes in Weapons

Further, changes to weapons and their storage presented new challenges to the floundering state militias. Following the Civil War, the hand-crafted arms of earlier times, which required expert craftsmanship and frequent repair, were replaced with standardized and mass-produced guns and ammunition. States often could not provide standard weapons, leaving the federal government to assume the responsibility of issuing military-grade rifles to the state Guards, which were housed in federal armories. This administrative change reflected a broad shift in thinking about the role of the independent citizen-soldier by forcing him to rely on the federal government rather than the state militia, further strengthening federal authority over state military organization. Previously, the Militia Act of 1792 required militiamen to procure military-grade weapons and store them at home, with the expectation that citizen-soldiers would be ready for training days and emergency musters. This arrangement reflected both the ideal of the citizen-soldier (armed and ready to serve in his state militia) but also practical concerns (state armories were often far from populated areas and not well stocked). But it was often challenging to meet this requirement because weapons could be limited in quantity and expensive to purchase. As Representative Joseph Varnum explained in 1832:

[353] Mahon, *History of the Militia and the National Guard*, 113-115.

> It is highly probable, that many more of the militia would have provided themselves with fire arms in the same way, if they had been for sale in those parts of the United States where the deficiencies have happened; but the wars in Europe have had a tendency to prevent the importation of fire arms from thence into the United States, which, together with the limited establishments for the manufacture of that implement in the United States has rendered it impossible for individuals to procure them.[354]

Following the Civil War, it was even more challenging for militiamen to purchase weapons and keep them in their private homes, eventually requiring the federal government to mandate procurement and storage. Over time, federal authority over the state Guards expanded, especially as it became clear that the states lacked the funds and leadership necessary to assure an effective military apparatus.

The Federalization of the State Militia System

Prominent military scholar Emory Upton was one of the first leaders in favor of a federalized militia system. Upton, a West Point graduate with a distinguished Civil War record, advocated for a small professional federal army that would be required, in peacetime, to train volunteer units to be prepared for times of crisis. Upton was critical of the ill-disciplined state militias and argued that state militias in the South ultimately compromised national security in the Civil War. According to Upton, the people should be loyal to the federal government rather than their states and perform their military duty under the auspices of the federal government, which would control the funding, organization, and training of both regular and volunteer units. Upton's position gradually gained support as it became clear that the traditional state militia system was insufficient to meet the challenges of modern times, a critique widely shared among National Guard leaders.[355]

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[354] Representative Joseph Varnum in *American State Papers*, volume I (Military Affairs, Class V, 1832), 193.
[355] General Emory Upton, *The Military Policy of the United States* (Washington, DC: Government Print Office, 1907), 66-67.

The National Guard Association was founded in 1879 as an organization of officers who envisioned a modernized and efficient militia system. The NGA had two political objectives: first, to establish the National Guard as the official reserve force for the United States Army; and second, to assure its status as a state military force in times of peace, independent of federal control. The NGA urged Congress to recognize the state Guard units as an organized militia distinct from the old system, claiming their goal was "to promote military efficiency throughout the active militia of the United States, and to secure united representation before Congress for such legislation as…may [be] necessary for this purpose."[356] The NGA also sought to preserve of the militia clauses in the Constitution: in modeling themselves on the militia tradition, Guard units needed to be protected by Congress; if the militia clauses were not fundamental to formation of the National Guard, Congress could easily bypass these clauses and organize the military according to their power to "raise and support armies," effectively dismantling state authority over its military.

Between 1881 and 1892 almost every state revised their military codes to establish select militias, which most states called the National Guard.[357] These new units played a military function in preserving domestic safety, but also served a civic role of organizing citizens into volunteer service. Both state governments and private business provided funding, but as labor unrest escalated, private interests became more influential to Guard organization. As an Illinois National Guard colonel explained in 1881:

> We have a battalion of five companies of cavalry, all located in the City of Chicago. It grew out of the riots of 1877…during the riots it was found necessary to have calvary, and we hastily organized a battalion of calvary among our business men who had seen calvary service during the war. Our calvary was not equipped by the State. It belongs to

[356] Proceedings of the Convention of National Guards, St. Louis, MO (1879), 2-3.
[357] War Department, Adjutant General's Office, Military Information Division, *The Organized Militia of the United States in 1898* (Washington, DC: Government Print Office, 1897), 5.

> the National Guard, but was equipped and uniformed completely by the Citizens' Association of Chicago. This association is composed of business men, who look after the best interests of our city.[358]

Beyond state and private funding, the Guards also received resources from the federal government, primarily through the efforts of the NGA petitioning Congress to increase supplemental funds to the state Guards. For example, the NGA lobbied Congress in 1887 to increase the amount the federal government provided the states to support their militias from $200,000, as mandated by the Arms for the Militia Act, to $400,000. While state Guard units benefited from federal funding, the NGA also worked through state actors, assuring the balance of federalism was preserved; often NGA leaders appealed directly to state Congressmen to represent their views in Congress. *The Army and Navy Journal* described the National Guard's political strategy in 1887: "Its members did not confine themselves to Congressional lobbying, but were able, through the National Guard of the various States, to bring a personal and direct pressure to bear upon the various Congressmen from their constituents."[359]

The aspirations of the state Guard units were lofty, emphasizing moral duty and civic virtue through effective leadership and disciplined training. In 1877 *The National Guardsman* articulated the goals and values of the National Guard:

> We believe in the National Guard – in its Divine authentication, its present purpose, and the glorious possibilities of its future…
>
> We believe in rifle practice as an important element of National Guard education – its benefits in promoting manliness, healthfulness, self-reliance, coolness, nerve, and skill…
>
> We believe in efficiency on the part of the commissioned officers – that the day has gone by when good-fellowship, a plethoric pocketbook, or political influence could command a commission.

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[358] Proceedings of the Convention of National Guards, Philadelphia, PA (1881), 3-4.
[359] *The Army and Navy Journal and Gazette of the Regular and Volunteer Forces* (W.C and F.P. Church: Philadelphia, PA), 1 January 1887.

> We believe in the moral influence for Good of the citizen soldiery – that the armory and the parade ground, so far from constituting places of contamination, comprehend schools wherein the members of the National Guard may learn their duty to God and man.[360]

A more lighthearted account of serving in the National Guard appeared in an illustrated pamphlet from 1884 called "Joining the Militia, or Comic Adventures of a Recruit." In this account, a pampered and clumsy man joined his local National Guard unit to avoid jury duty, a common practice at the time. Once he adjusted to the rigors of duty, he came to relish the discipline and training of Guard service: "He felt active, buoyant, and vigorous, and one evening coming from his bath tub he discovered little ridges of muscle rising on his forearm and stretching away toward the shoulder. A change began to come over the spirit of his dream."[361] Despite such amusing accounts, however, the goals put forth by the NGA were often not achieved due to lack of funds and leadership, making clear that legislative action was necessary.

The Creation of the National Guard

Guard units remained under state control following Reconstruction, but the familiar problems of disorganization and poor discipline that beleaguered the militia system led to calls for reform. While state Guard units sought autonomy from the federal government, it was soon apparent that the states could not provide adequate resources for their units and needed to accept federal sources of funds and equipment. A modernized version of the old militia system was envisioned that allowed the states and the federal government to share concurrent power. The federal government would provide resources for recruitment, training, and salaries, as well as supply weapons and armories. But the National Guard would remain under state control during peacetime, commanded by the state governor and available for state use in times of crisis. Just

[360] *The National Guardsman* (New York, NY), 1 August 1877, 1.
[361] Bricktof, *Joining the Militia, or Comic Adventures of a Recruit* (New York: J.B. Collin, 1884), 22.

as the traditional state militia system was a powerful political ideal, the National Guard soon became a symbol of well-ordered liberty: it connected citizen-soldiers in their collective military duty to serve both state and nation and stabilized competing political loyalties under a balanced federal scheme.

The first step in federalizing the militia system came with the Volunteer Act of 1898, which increased the National Guard's legitimacy and authority. The Act granted states broader control over their Guard units; established a volunteer quota to reflect the state's population; allowed governors to appoint officers; and revived the principle of uniform militia service, requiring all men aged eighteen to forty-five to serve. Further, it stipulated that the United States Army would include both the regular army and the reserve force of the National Guard volunteers. Finally, it formalized the purpose of a reserve military force: "That the Volunteer Army shall be maintained only during the existence of war, or while war is imminent, and shall be raised and organized, as in this Act provided, only after Congress has or shall have authorized the President to raise such a force or to call into actual service of the United States the militia of the several States."[362] Still, questions remained about the objectives and goals of the National Guard, particularly because many Guard leaders disagreed about the proper balance between state and federal authority. For example, Guard units from the South and Midwest formed their own organization, the Interstate National Guard Association, which favored state control over the National Guard, a restricted role for the federal Army, and the primacy of the National Guard

[362] The Volunteer Act, Section 187 (1898).

into wartime hostilities.[363] A New York unit, on the other hand, advocated for greater federal control over the National Guard and a more limited role for reserve forces.[364]

A Call for Reform

As it became clear that further legislation was necessary, the National Guard Association and key legislators called for a militia reform bill to reorganize and modernize the state military apparatus. Leaders commissioned studies in Europe to understand how other countries organized their reserves – but kept in mind the importance of the American militia tradition, founded on notions of republican duty and civic duty. Inspector General of the New York National Guard, Colonel William Sanger, prepared one such report and acknowledged the historical importance of the militia system and the need to retain it in a more modern form: "We always have been and always shall be largely dependent on our citizen soldiery to fight our battles…an effect militia is a force of greatest value."[365]

Secretary of State Elihu Root was tasked with drafting the militia reform bill. The proposed legislation largely reflected the traditional militia ideal that preferred citizen-soldiers to paid professional soldiers by integrating the state National Guard units into a federal reserve system. Since the nascent National Guard system emerged from the old militia system, the new scheme needed retain the familiar values of the militia ideal that emphasized citizen independence and state autonomy; the federal reserve system would be national, but would also protect the interests of the states and its citizens. To achieve that balance, Root stipulated that

[363] Colonel James M. Rice, "The Recent Congress and the National Guard," *Journal of the Military Service Institution* 19 (November 1896): 452-479.
[364] F. R. Coudert, Jr., "The Proposed Reorganization of the National Guard," *Journal of the Military Service Institution* 24 (March 1900): 239-245.
[365] Colonel William C. Sanger, *Report on the Reserve and Auxiliary Forces of England and the Militia of Switzerland: Prepared for President McKinley and Secretary of War Root* (Washington, DC: Government Printing Office, 1903), 9.

the new reserve system to call for nine months of federal service and remain under state control otherwise. Congressional debate regarding the bill was minimal. The primary issue was a provision that called for a 100,000 member volunteer federal reserve to serve as the third line in the Guard organization, which was opposed by Southern senators on the grounds that it would further limit state control over their military organization; Root eventually dropped this provision.[366]

Formalizing the National Guard

Thus the Militia Act of 1903, known as the Dick Act, formally established the National Guard as the reserve force for the federal Army.[367] The Dick Act substantially expanded federal authority over the state military apparatus, not only authorizing federal funding, uniforms, and equipment, but also set forth specific requirements for the states. First, the Act stipulated that within five years, state Guards must conform to the discipline and organization of the federal Army. Second, state Guards were required to perform twenty-four armory drills and one five-day encampment training per year to qualify for federal funds. Finally, volunteers were required to provide nine months of service within their state units to fulfill the militia purposes established in the Constitution: to repel invasions; to suppress insurrections; and to execute the laws of the federal government. While the Dick Act clearly federalized the National Guard, the states still retained a prominent role, particularly state governors, who were now permitted to request additional arms and resources for trainings and payment. Once a state accepted federal aid, however, they were required to abide by federal requirements. For example, states were now

[366] Philip C. Jessup, *Elihu Root*, volume I (New York, NY: Dodd, Mead, and Company, 1938), 265-268.
[367] The Dick Act was named after General Charles F. Dick, who was the chairman of the Militia Committee in the House of Representatives, president of the National Guard Association, and the commanding general of the Ohio National Guard – an embodiment of both old and new military traditions.

obliged to drill twenty-four times a year with two thirds of men present; organize five days of summer encampment; and were subject to annual inspection and required to address any violations. In sum, the Dick Act not only established the parameters of the National Guard, but also confirmed the primacy of the federal army by curtailing state authority over military organization.[368]

The Act was amended in 1908 to further solidify the role of the National Guard as the reserve military force and increased federal funding by an additional two million dollars. The amendments made clear that, in times of crisis, the National Guard would be summoned prior to a volunteer army. Further, service requirements were changed: volunteers were permitted to serve both within the country and beyond borders; the President was authorized to determine duration of service; and the mandatory medical examination prior to muster was eliminated.[369] The effect of these amendments professionalized the National Guard, as the requirements were more demanding and called for increased discipline and commitment for leaders and soldiers alike.

The final step in federalizing the state militia system came with the National Defense Act of 1916. In response to lingering tensions between National Guard leaders and those who favored a national reserve system independent of the states, the National Defense Act formalized the National Guard as a federally controlled institution and defined what was expected of the states in terms of administration. The Act stated that the National Guard was a crucial component to the United States military apparatus, with the federal government, particularly the President, retaining primary control over the National Guard; if any state refused to comply with

[368] An Act to Promote the Efficiency of the Militia, known as The Dick Act (1903).
[369] United States Congress, *Hearings before the Committee on the Militia* (1908).

the Act, the War Department was authorized to deny federal funds. The Act also reorganized the former Division of Militia Affairs into the Militia Bureau. The "organized militia" established in the Dick Act was the new National Guard, but the "unorganized" militia was still the traditional universal militia that required all able-bodied men between eighteen and forty-five to serve. (In theory, this universal state "militia" system still existed, but it was largely symbolic.)[370]

The National Defense Act addressed three organizing principles to formalize the structure of the National Guard: standardization of regiments; training requirements; and federal authority. First, the Act renamed all state Guard units as the National Guard and required that volunteers don the same uniforms worn in the United States Army; officers and Reserved Corps were no longer under state control, but organized according to protocol established by the War Department and paid by the federal government; and units were to be armed and disciplined according to operating procedures established by the federal Army. Next, the Act specified training details, most notably establishing the Reserve Officers' Training Corps (ROTC) to train officers to command the reserves; training musters were increased to forty-eight days and summer drill days to fifteen; and Guardsmen were required to take an oath of loyalty to their state and the federal government. Finally, the Act authorized full federal authority over the National Guard: the President could muster the National Guard through the state governors; however, if authorized by Congress, the President could directly summon the Guard into federal service.[371]

The National Defense Act of 1916 was amended in 1933 to further codify the United States military structure as a federal institution: "That the Army of the United States shall consist

[370] An Act for Making Further and More Effectual Provisions for the National Defense and for Other Purposes, known as The National Defense Act (1916).
[371] The National Defense Act (1916).

of the Regular Army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers' Reserve Corps, the Organized Reserves, and the Enlisted Reserve Corps.[372] The amendments focused on federalism and established the dual status of the National Guard: the Guard was both the state militia as well as the permanent reserve of the United States Army. This meant that the enlistment system was also concurrent, with Guard members taking oaths to serve in both their state unit as well as the national army if required. The amendments also guaranteed that state Guard units would remain intact if they were deployed for active duty. While the changes to the Act provided assurance that states retained their traditional "militias" and controlled their Guard units, the amendments reiterated the federalization of the militia system. Governors could nominate Guard leaders to assist at the federal level, but:

> All policies and regulations affecting the organization and distribution of the National Guard of the United States, and all policies and regulations affecting the organization, distribution, and training of the National Guard, shall be prepared by committees of appropriate branches or divisions of the War Department General Staff…[373]

The National Guard now fell under the federal military clauses of the Constitution, not its militia clauses, and the War Department renamed the Militia Bureau to the National Guard Bureau.

With the necessary legislation in place, the traditional state militia system was formally transformed into a federal army reserve. Secretary of State Elihu Root articulated the new vision of the American military apparatus: the three elements of the United States Army (regular soldiers, volunteers, and the universal militia) would "stand together in unity, strength, and efficiency to fight the battles of our beloved country."[374] The purpose of the National Guard was

[372] United States Congress, *To amend the National Defense Act of 1916*, Section 1 (1933).
[373] United States Congress, *To amend the National Defense Act of 1916*, Section 2 (1933).
[374] Elihu Root in Robert Bacon and James Brown Scott, eds. *The Military and Colonial Policy of the United States: Addresses and Reports by Elihu Root* (Cambridge, MA: Harvard University Press, 1916), 150.

to train men in peacetime who would, in theory, volunteer for the regular army in times of crisis, and future wars would be fought by the United States Army rather than individual militia units. Though the revised military structure was clearly under federal authority, many Army leaders still feared it was insufficiently national in character. For example, Major General Leonard Wood argued that despite legislative changes, the National Guard was "an uncoordinated army of fifty allies," inefficient, poorly organized, and unprepared to train recruits.[375] Major General Wood and others Army leaders pressured Congress to amend the Army Appropriations Act of 1912 to further weaken the role of the states in military matters. These amendments clarified the requirements of the federal reserve system, establishing the reserve system as a collective body of individuals with prior military experience and independent of a particular state unit. The amendments required a seven year term, three of active duty and four of reserve duty, but, as the amendment did not provide directives for reserve duty, many Guardsmen simply retired following their active duty.[376] In sum, this series of legislation formally established the primacy of the federal government in military matters and effectively dismantled the state militia system.

The National Guard as a Political Institution

Still, the symbolic importance of the citizen militia persisted despite the federalization and formalization of the reserve system, with the militia tradition serving as a cornerstone of identity for the National Guard and a foundational basis to its political objectives. For example, the National Guard Association published the pamphlet, "I Am the Guard" that situated the National Guard firmly within the context of the American militia:

[375] United States War Department, *Organization of the Land Forces of the United States* (Washington, DC: Government Printing Office, 1912), 19.
[376] United States Congress, *An Act Making appropriations for the support of the Army for the fiscal year ending June 30, 1921, and for other purposes*, Section 240 (1920).

> Civilian at Peace, Soldier in War…of security and honor, for three centuries I have been the custodian, I am the Guard.
>
> I was with Washington in the dim forests, fought the wily warrior, and watched the dark night bow to morning. At Concord's bridge, I fired the fateful shot heard 'round the world. I bled on Bunker Hill. My footprints marked the snow's fall at Valley Forge. I pulled a muffled oar on the barge that bridged the icy Delaware. I stood with Washington on the sun-drenched heights of Yorktown….these things I knew – I was there! I saw both sides of the War between the States – I was there!
>
> I am the Guard.[377]

The most important characteristic of the National Guard was its adherence to the militia ideal so integral to early American political life. Though it replaced the militia system, the character of the National Guard retained the spirit of the militia, a political institution that organized citizens in a republican military model that emphasized civic and political duties through the collective pursuit of common defense. While the militia system itself was essentially void and the states lost their ability to arm and regulate their militias, the institution of the militia – the institutional foundation of the Second Amendment – was preserved in the National Guard. The majority of Americans largely approved on the National Guard as a more efficient and organized militia model that still reflected the ideals of the traditional state militia system, focused on republican duty and well-regulated liberty. In a letter from Representative James Hay to President Wilson in 1916, Hay emphasized the people's support for the National Guard: "There are some political considerations to which I think I ought to call to your attention. The people in a democracy like ours, must be consulted, and I am within the bounds of reason when I say, that the National Guard plan is favored by a very large majority of the people."[378]

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[377] National Guard Association, "I am the Guard," reprinted in Mahon, *History of the Militia and the National Guard*, insert.
[378] Representative James Hay, *The Papers of James Hay* (Washington, DC: Library of Congress Manuscript Division, 1916).

As political scientist Martha Derthick explains, the National Guard played a unique role as a political institution, linking both the people to their states and the states to the federal government in the pursuit of safety and defense. According to Derthick, the National Guard was both militaristic and nationalist in character: the military purpose of the Guard was to provide national defense; the national function of the Guard was to integrate federal and state entities across a large and diverse country for the collective purpose of security. The administration of the National Guard relied heavily on the states, which led to frequent interaction between state and federal leadership, and the National Guard Association was crucial to connecting the people with the new militia model. NGA leaders helped clarify the Guard's purpose to the people, explaining that it was an essential component to the national military apparatus: as the Guard units were an indispensable element of the federal military structure, they were also closely linked to the states for organization and administration.[379] In other words, while the federalization of the militia system was a fundamental institutional shift that emphasized national authority, the states' ability to regulate and arm their citizens remained a central commitment.

Reinterpreting the Second Amendment

The professionalization of the National Guard reflected how profoundly the traditional militia established at the Founding had changed; with the federalization of the militia system, the militia of the Framers was replaced with a wholly federal military model; further, both changes to military circumstances and weapons technology weakened state authority. By the turn of the twentieth century, the United States had encountered threats and enemies very different from the Revolutionary War experience, and fought those battles using weapons far more complex than the colonial musket. While the role of a well-trained reserve system was still important, new

[379] Martha Derthick, *The National Guard in Politics* (Cambridge, MA: Harvard University Press, 1965), 1-3.

military challenges and technical changes in equipment meant that a professional army was essential. Thus the idea of a standing army, so loathsome a notion in the nation's early days, was no longer viewed as a source of tyranny, but a necessary military institution to guarantee national security. But if a well-regulated militia was no longer necessary to protect the states, however, it was unclear if the foundation of the Second Amendment had essentially changed, and if this interpretative shift would influence the debate about gun control that would emerge at the turn of the twentieth century.

Some scholars have argued that in replacing the traditional state militia system with the federal National Guard, the Second Amendment simply no longer guaranteed the right to bear arms. For example, historians Richard H. Uviller and William G. Merkel argue that the Second Amendment must be understood in the context in which it was written: it was intended to assure the states of an effective militia system by granting their militiamen the right to bear arms. But for Uviller and Merkel, the disappearance of the state militia system so profoundly altered the context of the Second Amendment that its meaning must be reconsidered in light of these changes. For Uviller and Merkel, the meaning of the Second Amendment was essentially eroded without the institutional foundation of the militia: "Today, no remnant of the original context of the Second Amendment language survives. Without those referents, linguistic and social, the meaning of the provision has been lost and the right must be deemed to be in suspension."[380] Uviller and Merkel argue the militia model is irrelevant to modern American politics and its historical importance should have no bearing on interpreting the right to bear arms: "The old militia had died a natural death long before anyone now living was born. Indeed, it would be

[380] H. Richard Uviller and William G. Merkel, *The Militia and the Right to Arms, or How the Second Amendment Fell Silent* (Durham, NC: Duke University Press, 2002), 166-167.

difficult to conceive of any institution less necessary to the security of the fifty free states at the beginning of the new millennium than the vanished common militia."[381] Without the militia, "the 'right of the people' has become a vacant and meaningless sequence of words."[382] For Uviller and Merkel, the right to bear arms is void without the foundation of the militia system: "…If the predicate institution for the acknowledged right has vanished, leaving no recognizable descendants, the right dependent upon it is deprived of its essence and becomes a vacant, silent relic."[383]

Uviller and Merkel's conclusion, however – if there is no militia, then there is no right to bear arms – is overly simplistic. The linear dismissal of a long-established constitutional right overlooks the importance of the militia tradition that was retained in the creation of the National Guard, and continues to underscore the modern debate about gun rights in American politics. Uviller and Merkel are correct that the context in which the right to bear arms has changed dramatically, but the federalization of the militia system has expanded, rather than limited, the right to bear arms to include the people as a collective body committed to the common defense. Granted, this arrangement is clearly not the militia system of old, but the militia spirit of a virtuous citizenry, armed and well-regulated by the states, is carried on in the National Guard to render an efficient and organized military organization. While the preamble of the Second Amendment remains unaltered ("A well regulated Militia, being necessary to the security of a free State…"), its meaning changed with the decline of the state militia system. The federalized National Guard made clear that a well-regulated militia, understood as the traditional state militia of the Founding, was no longer necessary to the security of a free state. The states did not need

[381] Uviller and Merkel, *The Militia and the Right to Arms, or How the Second Amendment Fell* Silent, 143.
[382] Ibid., 2.
[383] Ibid.

to arm their militias to protect themselves *against* federal encroachment; rather, they shared concurrent power *with* the federal government to arm and regulate their National Guard units.

Thus the right to bear arms shifted from the right of the states to the right of the people, as both United States citizens and residents of their particular states, in their collective duty to provide the common defense, understood in the context of collective military service. What had traditionally been understood as the right of the states to arm their militias was extended to include a right that "refers to the people as a collective body" to bear arms,[384] guaranteeing the right of "the people collectively for the common defense against a common enemy, foreign or domestic."[385] The balance of state and federal power initially remained in place; the states retained authority to regulate arms-bearing under the new federal scheme, as regulation was permissible both at the state and federal levels within constitutional limitations. Referring to the protections established in the Bill of Rights, Chief Justice Oliver Ellsworth wrote in 1787 that "it is enough that Congress have no power to prohibit [these rights] and can have no temptation. This objection is answered in that the states have all the power originally, and Congress have only what the states grant them."[386] Over one hundred years later, the states were still considered vital to the constitutional guarantee of protected rights – though the right to bear arms was no longer limited strictly to the states – but now included the collective body of citizens committed to the protection of liberties.

[384] City of *Salina v. Blaksley*, 72 KS (1905).
[385] Lucilius A. Emery, "The Constitutional Right to Keep and Bear Arms," *Harvard Law Review* 28 (1914-1915), 477.
[386] Oliver Ellsworth, "A Landholder, VI" (10 December 1787) in Merrill Jensen, ed., *The Documentary History of Ratification of the Constitution*, volume III (Wisconsin Historical Society Press, 1976), 490.

Anticipating the Gun Debate

Though the meaning of the Second Amendment shifted from a strict states' right to a collective right of the people at the turn of the century, arms-bearing continued to be interpreted in the context of military service, a limitation that would frame the debate about gun control in the years ahead. A century earlier, politician Timothy Pickering explained that bearing arms must be understood as a carefully regulated communal activity intended to provide for the common defense: "The Manner of loading and firing…is designed…to teach us to do every Action together, as well in the most expeditious Manner. For it is not the scattering Fire of one here, and another there, just as they happen to get loaded, that will frighten regular troops…"[387] The traditional meaning of the right to bear arms evolved in response to institutional changes, but the organizing principle of the militia – a collective body of armed citizen-soldiers providing for the common defense – still underscored the meaning of the right to bear arms.

The Second Amendment, then, continued to be understood in the context of a well-regulated militia, though the text no longer referred specifically to state militias, but more generally to the collective body of people under the auspices of military service. This collectivist interpretation of the Second Amendment – that the people's right to bear arms was based on an assumption of collective military service to provide for the common defense – would be codified in the early twentieth century, in academic scholarship, in state and federal legislatures, and in the courts, and widely accepted as the standard understanding of the constitutional right to bear arms. One of the many ironies of the political development of the Second Amendment is that at this juncture, the federalization of the militia system did not profoundly change the way the right to bear arms was applied to everyday politics: the people,

[387] Timothy Pickering, *The Essex Gazette* (Salem, MA), 21 February 1769, 119.

organized into collective military service, were guaranteed the right to keep and bear arms, with both the federal government and the states retaining authority to regulate weapons accordingly. This interpretative foundation, however, would later be challenged as the debate about gun rights intensified in American politics. The question of how this right would be regulated – which groups (or individuals) were constitutionally protected to keep and bear arms, under what circumstances, and under whose authority – would become increasingly contentious as the issue of gun control emerged as a defining political issue in the years to come.

Chapter Seven:

The Emerging Politics of Gun Control

In contemporary American politics, it is hard to imagine the issue of gun rights as anything other than the highly partisan and divisive dispute that has arisen in recent decades. But for the first half of the twentieth century – when the question of gun control became politically salient for the first time – the debate about balancing the rights of gun owners with gun control measures was relatively balanced, with supporters of each side working cooperatively to achieve satisfactory political outcomes. Historically, guns in America were both cherished symbols of republican liberty as well as practical tools of hunting, sport, and defense – but it was widely accepted that in a well-ordered political society, firearms must be carefully regulated. Even the 1875 book *The Pistol as a Weapon of Defence*, an enthusiastic endorsement of the handgun as a means of self-defense, made clear that citizens must adhere to prevailing gun regulations: "It is not every one that has the right to carry such an instrument which may at any moment be so used to cause the death of others…shall every man that in ordinary business matters is accounted of sound mind, be allowed to carry a pistol, when he choses to?" In fact, only the best sorts should enjoy the right to bear pistols, as "…we would urge that no man has a right to carry such a terribly efficient instrument of destruction unless he is perfectly assured of his power of self control, and of his ability to use the weapon without incurring the danger of injuring friends and innocent persons."[388]

From the nation's earliest days, firearms were regulated under state police powers to assure good order and public safety; the enforcement of gun laws, however, was often poorly

[388] Anonymous, *The Pistol as a Weapon of Defence: In the House and On the Road* (New York, NY: Industrial Publications, 1875), 9-10.

administered, resulting in the increase of violent crime by the turn of the century. (This was especially dangerous in densely populated urban areas. For example, guns were abundant in New York at the time and police regularly confiscated illegal weapons during routine arrests; a *New York Tribune* article from 1903 estimated 20,000 New Yorkers owned firearms, but a mere 600 possessed the necessary permit.)[389] Influenced by Progressive Era reforms and concerned about the rise in gun crime, state legislators began to question with greater intensity who should be allowed to bear arms, where it was appropriate to do so, and what sorts of weapons were permissible. For the first time, the role of the gun in America became a prominent political and social issue, focusing on two concerns that had recently become problematic: first, if certain "dangerous" groups were permitted to bear arms (for example, immigrants and political radicals); and second, if and where citizens were entitled to carry concealed weapons.

As a result, comprehensive federal gun control measures emerged that focused on which groups, and under what circumstances, were constitutionally protected to keep and bear arms, legislation that was then challenged in the courts as the parameters of the Second Amendment were tested for the first time. Over the course of the twentieth century, the Supreme Court codified a collectivist interpretation of the right to bear arms, or what political scientist Robert Spitzer describes as the "court view," that emphasized state control over arming its militia, a position that would remain dominant until the landmark ruling *District of Columbia v. Heller* (2008) overturned decades of precedent.[390] The position of the Supreme Court, however, reflects a central irony to the evolution of gun rights as a contentious issue in American politics: while

[389] *New York Tribune* (New York, NY), 21 June 1903.
[390] According to Spitzer, the "court view" of the Second Amendment means that it "affects citizens only in connection with citizen service in a government-organized and -regulated militia." See Robert J. Spitzer, "Lost and Found: Researching the Second Amendment," in Carl T. Bogus, ed., *The Second Amendment in Law and History* (New York, NY: The New Press, 2000), 25.

the courts established a standard legal model of interpreting the Second Amendment as a collective right, it was developments outside of the courts – including the growth of the gun industry, the escalation of gun violence, the gun control legislation that followed, and the rising political influence of gun rights groups – that would challenge the established interpretation of the Second Amendment and set the stage for the modern debate about gun rights in American politics.

The Intersection of Law and Politics

Prior to accounting for these changes, however, it is first necessary to revisit the traditional legal understanding of the Second Amendment, and how this interpretative context affected the emerging politics of gun control. With the federalization of the state militia system, the meaning of the Second Amendment expanded beyond a strict states' right interpretation to include the right of the people to keep and bear arms as a collective body organized under the auspices of military service, now overseen by the National Guard. Over time, the collectivist interpretation of the Second Amendment would become deeply entrenched in both law and politics, reflected in the federal firearms legislation that developed over the twentieth century and the legal challenges that followed. In 1915, Chief Justice of the Maine Supreme Court, Lucilius A. Emery, published a short but influential article in the *Harvard Law Review* entitled "The Constitutional Right to Keep and Bear Arms," which analyzed the Second Amendment in the context of changing gun regulations and captured the current position on the right to keep and bear arms, both in law and politics.[391] This article would become the defining document of the

[391] Lucilius A. Emery, "The Constitutional Right to Keep and Bear Arms," *Harvard Law Review* 28 (1914-1915): 473-477.

collectivist interpretation of the Second Amendment, but it is noteworthy for two other reasons as well.

First, Emery's commentary was the first comprehensive treatment of the Second Amendment in a scholarly journal; until the publication of Emery's article, the Second Amendment had been largely overlooked in academic scholarship – primarily because there was little debate about its meaning or how it should be applied to the issue of gun control. (The first law review article to discuss the Second Amendment was published in 1912. In a brief mention in the "Current Topic and Notes" section, *American Law Review* considered the constitutionality of Georgia's law requiring a permit to carry a handgun; though the analysis of the Second Amendment was cursory, the conclusion was consistent with previous interpretations that understood the right to bear arms in the context of military service: "The many decisions which have already been made as to statutes against carrying concealed weapons or weapons of a certain character show…that such provisions should be construed in the light of the origin of the constitutional declarations and the necessity for an efficient militia or for the common defense."[392] A second law review article mentioning the Second Amendment was published in 1913, questioning a New York gun regulation, but did not articulate a definitive position on the right to keep and bear arms.)[393] Second, Emery established a template for Second Amendment scholarship that would be widely replicated in years to come: an overview of the history of the right to bear arms in England; how the understanding of this right differed in the colonies; an account of changing circumstances and current trends in gun regulation; and how to interpret the right to bear arms given these legislative changes.

[392] "The Constitutional Right to Keep and Bear Arms and Statutes Against Carrying Weapons," *American Law Review* 46 (September-October 1912): 778.
[393] "Right to Bear Arms," *Law Notes* 16 (February 1913): 201-208.

Collective Rights Theory

Emery was primarily concerned with the scope of governmental control over firearms legislation and questioned whether the Second Amendment impeded a more robust scheme of gun control. Historically, the constitutionality of federal gun legislation had not been a pressing political issue because the states were tasked with regulating weapons, based on the rights-bearing provisions in their state constitutions and their established police powers to provide for the common defense. Emery referenced Judge Thomas Cooley's position in 1868: "How far it may be in the power of the legislature to regulate the right we shall not undertake to say. Happily there neither has been nor, we may hope, is there likely to be much occasion for an examination of that question by the courts."[394] But for Emery, changes in modern America – particularly the prevalence of dangerous weapons and the rise of gun violence – advanced the question of Second Amendment interpretation to the forefront of current politics:

> The greater deadliness of small firearms easily carried upon the person, the alarming frequency of homicides and felonious assaults with such arms, the evolution of a distinct class of criminals known as "gunmen" from their ready use of such weapons for criminal purposes, are now pressing home the question of the reason, scope, and limitations of the constitutional guaranty of a right to keep and bear arms, – of the extent of its restraint upon the legislative power and duty to prohibit acts endangering the public peace or the safety of the individual.[395]

Emery began his inquiry with an examination of the right to bear arms in England, noting that British law limited arms-bearing to landowners and other privileged classes; such statutes made clear "that a right to keep and bear arms was not regarded as a fundamental right of every Englishman."[396] In contrast to weapons restrictions, however, bearing arms was required by the government for certain classes to fulfill their military duty: "These landed proprietors, with their

[394] Emery, "The Constitutional Right to Keep and Bear Arms," 473.
[395] Ibid.
[396] Ibid., 474. For a detailed account of arms-bearing in England, see Chapter One of this dissertation.

tenants and retainers thus armed, constituted the military forces, the *miletes*, the militia of the kingdom."[397] For context, Emery provided a brief history of arms-bearing in Great Britain: King Charles II organized a formal army for royal protection; successor King James II increased the standing army for military defense; he then issued a decree that forbade Protestants from militia service, thus depriving a large body of people the right to bear arms. The British Declaration of Rights addressed this grievance, demonizing the standing army and demanding "Protestants may have arms for their defense suitable to their condition, and as allowed by law."[398] Across the pond, however, the situation was different:

> In the American colonies, with their small revenues and beset as they were with savages and other enemies, it was deemed necessary that every man of military age and capacity should provide himself with arms and be ready to bear them in defense of himself and his neighbors and the colony at large. Accordingly every man of military age and capacity was enrolled for military service and was required by law to provide and keep at his own expense specified arms and equipments for such service.[399]

American abhorrence of standing armies and the preference for a citizen militia was clearly articulated in various state constitutions and reiterated in the Bill of Rights. For Emery, the Second Amendment directly addressed the colonial objection to standing armies and the guarantee of a well-regulated militia for the defense of the people and the states: "Thus construed it is a provision for preserving to the people the right and power of organized military defense of themselves and the state and of organized military resistance to unlawful acts of the government itself, as in the case of the American Revolution."[400] Further, Emery interpreted the right to bear arms in the context of military service, claiming that "the single individual or the unorganized

[397] Emery, "The Constitutional Right to Keep and Bear Arms," 474.
[398] Ibid.
[399] Ibid., 475.
[400] Ibid., 476.

crowd, in carrying weapons, is not spoken of or thought of as 'bearing arms.' The use of the phrase suggests ideas of a military nature."[401]

Emery's interpretation of the right to bear arms in the context of military service led him to two conclusions: the Second Amendment did not limit the ability of Congress to regulate arms; further, the right to bear arms was not an individual right, but the people's collective right. First, because the Second Amendment protected arms-bearing in the context of military service, "only persons of military capacity to bear arms in military organizations are within the spirit of the guaranty." Congress was unimpeded to regulate arms which fell outside of this category, including such weapons "not usual or suitable for use in organized civilized warfare, such as dirks, bowie knives, sling shot, brass knuckles, etc., and the carrying of such weapons may be prohibited." Also, the federal government was authorized to regulate which citizens were suitable to bear arms and where they were free to do so, meaning that Congress could determine those not capable of responsible arms-bearing ("women, young boys, the blind, tramps, persons *non compos mentis*, or dissolute in habits"); further, Congress could regulate the carriage of concealed weapons and restrict carrying weapons in certain public places.[402] Second, Emery asserted that the Second Amendment "is not so much to the individual for his private quarrels or feuds as to the people collectively for the common defense against the common enemy, foreign or domestic." The people's safety must take first priority, thus arms-bearing was understood as a means to protect the collective body of the people from danger; it did "not to give individuals singly or in groups uncontrollable means of aggression upon the rights of others."[403] In such circumstances, "the carrying of weapons by individuals may be regulated, restricted, and even

[401] Emery, "The Constitutional Right to Keep and Bear Arms," 476.
[402] Ibid.
[403] Ibid., 477.

prohibited according as conditions and circumstances may make it necessary for the protection of the people."[404]

Emery's article was influenced by the historical understanding of the Second Amendment as a states' right – the right of the states to arm their militias to defend their people from federal encroachment – but Emery expanded this right to now include "the people collectively for the common defense against the common enemy, foreign or domestic."[405] The right to bear arms was still based on the justification of military service, as only those who "bear arms in military organizations" were fully protected under the Second Amendment. This now referred to the National Guard, not the state militia system; rather than the right of the states to arm their militias, the right to bear arms was understood as the people's collective right under the auspices of the newly established National Guard. Such a protection, however, did not pose a threat to gun regulation: while citizens were entitled to bear arms according to state constitutions and common law, arms-bearing outside the context of military service could be regulated by both the states and the federal government. In sum, Emery's article articulated a widely accepted understanding of the Second Amendment that expanded a strict states' right interpretation to a collective right of the people, a position that would influence state and federal legislatures as they established more sweeping gun control measures, and would later be sanctioned by the Supreme Court.

The Quiet Second Amendment

Emery's article was groundbreaking as one of the first scholarly inquiries into the constitutional interpretation of the Second Amendment and how it should be applied to

[404] Emery, "The Constitutional Right to Keep and Bear Arms," 477.
[405] Ibid.

developing political issue of gun regulation. But it was not only academic scholarship that had overlooked the right to bear arms; the Supreme Court had also been relatively quiet on the Second Amendment, addressing its meaning directly in only two nineteenth century cases. *Presser v. State of Illinois* (1886) argued that the right to bear arms was protected in connection to militia service, regulated by the states and the federal government, and did not apply to the states. Further, the Court provided a narrow definition of the militia, asserting that private citizens did not have the right to organize militias independent of state or federal authority, as "military organization and military drill and parade under arms are subjects especially under the control of the government of every country."[406] Using reasoning similar to *Presser*, the Court then ruled in *Miller v. Texas* (1894) that a Texas law restricting "the carrying of dangerous weapons" did not violate the Second Amendment and reiterated its previous position that the Second Amendment did not apply to the states.[407] Now, however, the Supreme Court was required to interpret the right to bear arms in response to two corresponding developments: the growth of the gun industry, and in response, the rise of gun control. These changes called into question who, and under what circumstances, was guaranteed the right to keep and bear arms, thus testing the constitutional parameters of the Second Amendment and how it should be applied to the emerging issue of gun rights in American politics.

The American Gun Industry

By the turn of the of the twentieth century, guns had evolved dramatically from the cumbersome muskets of the colonial era to lightweight and dangerously efficient weapons, technologically advanced and assembled in large quantities. Production models for weapons had

[406] *Presser v. State of Illinois* (1886).
[407] *Miller v. Texas* (1894).

changed during the Civil War with the growth of domestic manufacturing of weapons as well as increased importation from Europe. Aside from war weapons, the dragoon pistol became the first gun to be mass produced by Samuel Colt; it was a streamlined weapon based on older models but easier to manufacture, resulting in wide commercial success and a fledging gun industry well funded by private capital. Further, the Franco-Prussian War encouraged foreign investment in the American weapons market.[408] In the past, guns had been handcrafted and repaired by artisan gunmakers; now, both guns and ammunition could be mass produced in large factories. Small gun businesses were soon absorbed into larger and more sophisticated operations, such as Colt, Smith & Weston and Winchester, companies that manufactured rifles, pistols, cartridges, and ammunition. As a result, inexpensive pistols were easy to procure by 1900: known colloquially as "suicide specials," these weapons could be purchased for as little as two dollars and light enough to be shipped through the mail, meaning that acquiring a pistol was both inexpensive and convenient.[409] The gun industry was largely autonomous from federal oversight and the weapons on the market – revolvers, automatic pistols, repeating rifles, and automatic shotguns – were widely available to both law-abiding citizens as well as criminals. As historians Lee Kennet and James LaVerne Anderson describe, "the ubiquitous gun is thus one of the more improbable indicators of the egalitarian nature of our society, and to many it is one of the most disturbing. The American firearms industry made an armed society possible."[410]

By the 1920s, access to dangerous weapons and increased gun crime led to greater scrutiny of the gun industry by both the states and the federal government. Gun silencers had become commonplace in gun incidents, as well as sawed-off shotguns, which featured a

[408] See John W. Oliver, *History of American Technology* (New York, NY: Ronald Press, 1956).
[409] See Donald B. Webster, *Suicide Specials* (Harrisburg, PA: The Stackpole Co., 1958).
[410] Lee Kennet and James LaVerne Anderson, *The Gun in America* (Westport, CT: Greenwood Press, 1975), 107.

shortened barrel that was deadly at close range and simple to operate – perfect for the common criminal.[411] Further, the "tommy gun" was used in a spate of violent crimes: originally designed for trench warfare, the tommy gun was a submachine gun, relatively light and easy to transport, that could fire .45 caliber bullets automatically until the trigger was released.[412] Such weapons and the violence that ensued changed the tone of the political debate about guns as the call for federal regulation began to escalate. Now, both the states and the federal government had to contend with a series of new challenges, including decisions as to which weapons were reasonable for law-abiding citizens to possess, and if criminals and other suspect groups were entitled access to weapons.

The Rise in Gun Crime

At this juncture, it was unclear how weapons should be regulated or, to address a greater concern, if they were even permissible in modern American society: despite the cherished militia ideal, changes to the national military structure and the professionalization of modern police forces challenged the practical need for the armed citizen-soldier. With increased access to guns and the rise in violent gun crime, state legislators began to question who should be allowed to bear arms, where it was appropriate to do so, and what sorts of weapons were legally protected. Handguns, in particular, came under increased scrutiny. For example, Alabama imposed, in 1892, a heavy fine on licenses to sell handguns; Texas, in 1907, levied a 50% tax on handguns; and Oregon, in 1913, required a license to procure a handgun with recommendations "from at least two reputable freeholders as to the applicant's good moral character."[413] Leader and

[411] George Watrous, *The History of Winchester Firearms, 1866-1966* (Winchester-Western Press, 1966), 52.
[412] William J. Helmer, *The Gun that Made the Twenties Roar* (New York, NY: MacMillan Co., 1969), 18.
[413] Alabama, *Code* (1897), I, Section 27, Chapter 110; Texas, *Complete Texas Statutes* (1928), Article 7068; Oregon, *An Act Forbidding the Sale, Barter, Giving Away, Disposal of or Display for Sale of Pocket Pistols and Revolvers and Fixing a Penalty for the Violation thereof, Laws* (1913), 497.

commentator Booker T. Washington believed it a "vulgar habit" to routinely carry a pistol: "There is no reason why a person in a civilized country like the United States should get into the habit of going around in the community loaded and burdened with a piece of iron in the form of a pistol or a gun."[414] Despite state efforts to curtail gun violence, however, it was clear that further legislation was necessary to balance the interests of gun owners with public safety.

Gun regulation, ad hoc as it was at this point, had not been contested as a constitutional issue, as states were free to regulate arms under their regulatory police powers, nor were the parameters of gun control measures widely debated. The Second Amendment was not considered antithetical to state gun regulation, limiting only the federal government from infringing on the right to bear arms understood in the context of state militia service; the states retained the ability to regulate (or not) firearms as they deemed necessary. Gun restrictions were legitimate as long as they prevented criminals from obtaining dangerous weapons and did not disarm law-abiding citizens. For example, a 1909 article from the *Belleville News Democrat* opined:

> Few people will go so far as to insist that under the Second Amendment a city may not require registration of persons carrying revolvers, nor, indeed to require them to show that their business is such as to make carrying a pistol a necessity. Those of good character and whose work is such that personal protection is required are granted permits without undue delay.[415]

At this point, the right to bear arms was not considered as a constitutional question, but one of common law, as citizens were permitted to keep and bear arms only if they complied with state regulations. In sum, the Second Amendment was not a relevant factor in gun regulation: it was

[414] "Booker T. Washington Asks Negroes to Suppress the Gun-Toter," *Iowa State Bystander* (Des Moines, IA), 2 February 1912, 2.
[415] James A. Woolson, "Question of the Right to Bear Arms," *Belleville News Democrat* (Belleville, IL), September 1909, 4.

widely understood as a protection for the people to bear arms in collective military service and did not preclude state governments from regulating other firearms as they deemed appropriate.

Many state governments, in fact, were not strict in regulating weapons. This became increasingly problematic in densely populated urban areas, particularly New York City, which began to receive national attention due to the rise in gun crimes. In response to armed gang violence, New York police officers were permitted to carry arms, and concealed firearms were largely tolerated. A 1866 statute prohibited the concealed carriage of "sling shot, billy, sand-club or metal knuckles and any dirk or danger, or sword cane or air gun" but did not restrict pistols.[416] A law passed in 1877 required a permit to carry pistols, but permits were easy to obtain and enforcement was minimal. (Discussion regarding this law centered on an issue that would later come to animate the modern gun control debate. The New York Board of Aldermen feared that such a statute would adversely affect lawful citizens, who would then be unable to defend themselves against armed criminals.)[417] Concerns about weak gun laws appeared in many newspapers, but the tone was often facetious. For example, the *New York Tribune* quipped: "Let a mad dog, for instance, take a turn around Times Square, and the spectator is astonished to see the number of men who will produce firearms from some of that multitude of pockets with which man, as constructed by the tailor, is endowed." Of this crowd of armed men, most would miss the mad dog because "the average New Yorker who carries a pistol cannot hit anything with it."[418] A series of violent events, however, escalated the question of arms-bearing to a serious national political concern. Momentum for more comprehensive gun reform had been

[416] New York, *An Act to Prevent the Furtive Possession and Use of Slung Shot and other Dangerous Weapons, Laws* (1866), II, 1523.
[417] New York Board of Aldermen, *New York Tribune* (New York, NY), 22 February 1878, 4.
[418] *New York Tribune* (New York, NY), 20 April 1892, 18.

building since the turn of the century, particularly as attitudes about guns shifted from benign tolerance to increased distrust. George C. Holt, a federal district judge in New York, claimed in widely reprinted remarks, "The repeating pistol is the greatest nuisance in modern life."[419] Despite efforts to enforce existing gun control statutes, homicides committed with firearms had increased almost twofold in New York City by 1910, and leaders and politicians began to call for a more sweeping state permit system. The assassination attempt on Mayor William J. Gaynor, as well as other brazen shootings – such as the attack of novelist David Graham Phillips in broad daylight – intensified efforts for a more robust gun control scheme.[420]

The Advent of Gun Control

Local politician Timothy D. Sullivan spearheaded the campaign for comprehensive gun reform in 1911. Sullivan's proposed law was the first of its kind in the United States and presented a plan to regulate the carriage, sale, and possession of weapons. The law echoed prior legislation that banned dangerous weapons (other than pistols) and prohibited illegal residents and minors from carrying weapons, but also included three new sections. First, Section 1897 of the New York Criminal Code was amended to make it a felony to carry a concealed firearm without a license; next, it required a permit to carry a firearm and failure to do so was now categorized as a misdemeanor; finally, gun merchants could only sell weapons to those with legitimate permits and were required to keep detailed records of gun sales. According to Sullivan, "If this bill passes, it will do more to carry out the commandment thou shall not kill and save more souls than all the talk of all the ministers and priests in the state for the next ten years."[421]

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[419] George C. Holt, *The Independent* (New York, NY), 11 August 1910, 280.
[420] *New York Tribune* (New York, NY), 30 January 1911, 3.
[421] *New York Tribune* (New York, NY), 11 May 1911, 1.

There was some debate over Sullivan's proposed bill, but overall it was widely supported. Politicians and editorialists used the bill to comment on the broader problem of guns in the United States and encouraged other states to pass similar legislation. New York Chief Magistrate William McAdoo wrote a widely circulated editorial regarding "the curse of the pistol":

> I would as soon place a full-venomed cobra snake in my house as a loaded revolver. Look at the tragedies in the morning newspapers; where husband shoots wife, man shoots mistress, one child shoots the other, frenzied head of family kills the whole family and himself, until all over the country is bang! bang! bang! every hour of the day and night.[422]

Other editorials made clear that such legislation was not antithetical to the Second Amendment: according to the *New York Times*, the Second Amendment "does not restrict the right of the states, in the exercise of their police power, to regulate the manner in which arms shall be kept or borne."[423] The Sullivan Bill was the first step in developing more stringent gun control measures nationwide, but, as gun crimes continued to rise and receive more coverage in the press, political organizations began to offer their own proposals to state legislatures. For example, the American Bar Association issued a statement in 1922 urging a sweeping ban on pistols: "We recommend that the manufacture and sale of pistols and of cartridges designed to be used in them, shall be absolutely prohibited, save as such manufacture shall be necessary for governmental and office use under legal regulation and control."[424] In New York, some advocated for complete disarmament, including police forces: "If nobody had a gun, nobody would need a gun."[425]

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[422] William McDoo, "Crime and Punishment: Causes and Mechanisms of Prevalent Crimes," *Scientific Monthly* 24 (May 1927), 419.
[423] *New York Times* (New York, NY), 10 August 1910.
[424] American Bar Association, "For Better Enforcement of the Law," *American Bar Association Journal* 8 (September 1922), 591.
[425] *New York Times* (New York, NY), 9 November 1925, 21.

In contrast, the United States Revolver Association, an organization of competitive pistol shooters, proposed what they called the Uniform Firearms Act. The United States Revolver Association was founded in 1900 to "foster the art of the revolver and small-arm shooting" by providing training and organizing pistol competitions.[426] (Its commitment to proper training and sportsmanship was similar to the mission of the National Rifle Association, but focused on pistols rather than rifles.) The USRA was concerned both with public safety as well as protecting law-abiding gunowners from undue restriction, urging leaders to "join the movement for safe, sane, and also fair and equitable revolver laws."[427] The USRA suggested various measures to establish reasonable gun regulations, including licensing rules and restrictions on gun ownership. For example, the USRA suggested that citizens could purchase any weapon deemed legitimate by the state, but must register with a licensed dealer; further, potential buyers would have to account for why they required a gun before receiving a license. Criminals convicted of burglaries or violent crimes would be prohibited from procuring arms and anyone caught committing a crime while armed would be convicted of a felony.[428]

The USRA presented their plan to Kansas Senator Arthur Capper, who then brought a similar bill to Congress in 1922 – an early example of a gun rights group influencing firearms legislation. Capper's proposal required that anyone purchasing a handgun must apply to a licensed gun seller; also, it recommended a forty-eight hour waiting period before the purchase could be finalized, intended to prevent crimes of passion and to allow police to review applications. Gun buyers must be law-abiding citizens and not one of the groups prohibited from

[426] "Revolver Association Incorporated," *New York Times* (New York, NY), 24 January 1904, 11.
[427] "Effective Law Offered against Toting of Guns," *Arizona Daily Star* (Tuscan, AZ), 15 May 1912, 3.
[428] "The Effects of Revolver Legislation upon Hardware Dealers," *American Artisan and Hardware Record* (Chicago, IL), 25 May 1912, 30.

acquiring weapons, such as criminals and minors. The Capper Bill received favorable press, particularly as a compromise to reconcile gun regulation with the Second Amendment, an issue that was becoming increasingly contentious as gun owners feared their rights would be infringed under the new legislation. The *San Antonio Evening News* opined:

> How to safeguard [the Second Amendment], which is still valuable – even in this highly-civilized age with its supposedly efficient police systems – and also curb the dangerous criminal and habitual "pistol-toters," is a problem that has long perplexed both lawmakers and peace officers…this bill is drawn to do away with the numerous abuses of the "right to bear arms." It is no more drastic than present laws in some States – but uniformity is essential to effectiveness.[429]

Though the Capper Bill, aimed at regulating weapons in Washington, D.C., did not pass, it gained national attention (and favor in the Senate) after Vermont Senator Frank Greene was wounded in a gunfight between Washington police and bootleggers, escalating the question of how to balance gun rights with public safety to the national stage.

As the issue of gun violence became a pressing political concern, sporting associations (precursors to many modern gun rights groups) began to protest federal gun regulation, defending the right of law-abiding citizens to keep and bear arms. For example, the sportsmen's journal *Outing* opposed gun control, citing the necessity of guns for hunting, but also claiming that widespread gun ownership was "the best protection we have against robbery and arson, murder and rape."[430] Some state lawmakers also contested gun laws on the grounds that virtuous citizens with guns could help curtail the recent crime wave, another theme that would come to animate the contemporary debate about gun rights. The Pennsylvania State Police Superintendent Lynn Adams explained: "The outlawing of pistols and revolvers is not likely to decrease crimes of this character; in fact, it might tend to increase them, as thugs would no

[429] "An Uniform Pistol Law," *San Antonio Evening News* (San Antonio, TX), 7 November 1922, 4.
[430] Horace Kephart, "Arms for Defense of Honest Citizens," *Outing* 79 (September 1921): 286.

longer have any cause to feel that their victims might be armed."[431] Congressman Thomas Blanton of Texas made a robust case for the benefits of an armed citizenry during debates about the Miller Bill, which sought to ban mail order gun sales:

> I hope every woman in America will learn how to use a revolver. I hope she will not use it but I hope she will know how. It will be for her safety; it will safeguard her rights and it will prevent her rights from being jeopardized. That is what the framers of this Constitution had in mind when they said the Congress should never infringe upon the right to keep firearms in the home.[432]

Overall, however, opposition to state gun control proposals was relatively muted, particularly as many state legislators, responding to the rise in gun violence, shifted to favor a comprehensive national plan to regulate firearms that balanced public safety with the rights of law-abiding gun owners.

Federal Firearms Legislation

Senator Capper returned to Congress in 1932 with a revised version of his previous proposal. The Capper-Norton Bill again recommended background checks prior to the purchase of a handgun and a forty-eight hour waiting period before the weapon was obtained by the buyer. In addition, the bill limited the open display of weapons in gun shops and made the licensing process more rigorous. The purpose of the bill, according to Capper, was for Congress to assume the "responsibility to see that firearms are delivered safely only into the hands of persons qualified to use them for protection – not for slaughter."[433] This time, the bill passed and was signed into law by President Herbert Hoover in July. The Capper-Norton Bill applied only to

[431] Lynn G. Adams, "Adequate and Proper Restriction on the Sale and Ownership of Firearms," *Annals of the American Academy of Political and Social Science* 125 (May 1926): 153.
[432] Thomas Blanton, "Speech before United States Congress," *Congressional Record* LXVI (1924): 728.
[433] Arthur Capper, "Firearms for Protection – Not for Slaughter," *Capper Papers* (8 January 1932): 11.

Washington, D.C., but other states soon passed similar statutes regulating the purchase and carriage of handguns. Federal gun legislation would soon follow.

The Roosevelt administration proposed firearm regulation as part of a broader plan to combat organized crime in the 1930s, seeking to nationalize firearm registration and coordinate various state laws into a uniform system for the purchase and carriage of weapons. As a result, the National Firearms Act of 1934 was the first federal legislation to regulate the purchase and transport of dangerous weapons, reflecting the government's commitment to gun control as well as the broader New Deal trend of nationalizing legislation that had previously been handled at the state level. The Act proposed a taxation scheme that regulated certain kinds of weapons commonly used in organized crime, including machine guns, sawed-off shotguns, and gun silencers; further, the Act imposed taxes on the production, selling, and transfer of these weapons, with the intent of thwarting criminal from obtaining dangerous arms.[434]

The National Firearms Act was expanded four years later. United States Attorney General Homer Cummings was instrumental in drafting the proposed changes, which included provisions concerning the federal taxation of firearms and a permit system. The bill proposed a national registration for certain classes of weapons and accoutrements, which included pistols with a caliber greater than .22; sawed-off shotguns with barrels less than eighteen inches; fully automatic machine guns; and various other weapons that had no clear military purpose, such as guns concealed in canes. Any citizen who wished to buy, sell, manufacture, or import a gun would be required to obtain a federal permit. Further, a federal tax would be imposed every time a weapon was sold, with machine guns taxed heavily. When weapons changed hands, buyers and sellers were required to be fingerprinted and file tax documents with the Internal Revenue

[434] The National Firearms Act (1934).

Service. Finally, citizens already in possession of firearms would be required to register them with the IRS and pay taxes accordingly.[435] The bill enjoyed wide support in Congress and from the majority of the American people; the Institute of Public Opinion issued a survey that asked, "Do you think all owners of pistols and revolvers should be required to register with the government?," to which 84 percent of respondents favored federal registration.[436]

The Emergence of Gun Rights

In the past, there had been some opposition to state gun restrictions, but it had been an largely disorganized and ineffective effort; arguments against the proposed Federal Firearms Act, however, were carefully orchestrated by sporting organizations and gun manufactures, and, for the first time in Congress, debate about gun control became politically polarizing. The National Rifle Association and the United States Revolver Association were instrumental in coordinating the protest. The National Rifle Association, historically linked with the National Guard Association, was founded in 1871 by a group of New York National Guardsmen (the key leader of this group was George W. Wingate, who was also the first president of the National Guard Association). The founding principles of the National Rifle Association had not been inherently political, but focused on improved marksmanship and forging a closer relationship between the United States Army and state Guard units. At this juncture, however, the NRA became involved in the politics of gun control for the first time by encouraging opposition to the bill through an intense canvas of its supporters. They warned members that the government's intention was the eventual registration of all firearms, infringing upon the rights of law-abiding gunowners: "Within a year of the passage of H.R. 9066, every rifle and shotgun owner in the country will

[435] The Federal Firearms Act (1938).
[436] The survey was widely reprinted in newspapers across the country. For example, see Institute of Public Opinion, "Pistol Registration Approved by 4 to 1 Majority in Survey," *Altoona Tribune* (Altoona, PA), 2 May 1938, 11.

find himself paying a special revenue tax and having himself fingerprinted and photographed for the federal 'rogue's gallery' every time he buys or sells a gun of any description."[437]

Gun manufacturers also opposed the proposed bill and coordinated opposition efforts. For example, Colt, the only gun company at the time to produce machine guns, sent representatives to protest the bill on behalf of gun manufactures. Colt president Frank C. Nichols argued, "We have been in business nearly a hundred years, an honorable business and a legitimate business. We have used the utmost care in the distribution and sales of our product."[438] Senator Royal S. Copeland of New York, a key architect of the bill, blamed opposition groups for misrepresenting its intent: "The impression has been sent all over the country we are trying to embarrass the farmer so that he cannot use a revolver or shotgun, or leave one with his wife, or take a pistol along in his automobile."[439] Opposition from sporting groups and gun manufactures succeeded in influencing the proposed bill, which was eventually amended to remove pistols from the list of weapons to be taxed and licensed. The final bill established a federal licensing system that regulated the transfer of weapons across state lines: weapons could not be shipped between states unless the sale was in compliance with both states' laws; further, convicted felons were not allowed to purchase weapons across states lines.[440] While not yet the contentious debate so familiar in contemporary American politics, the issue of gun rights was slowly simmering, soon to be tested in the courts as the parameters of the Second Amendment were challenged.

[437] United States Senate, *Hearings* (1934), 73.
[438] United States House of Representatives, *Hearings* (1934), 157.
[439] United States Senate, *Hearings* (1934), 63.
[440] National Firearms Act (1934).

The Second Amendment in the Courts

With the increase in gun regulation over the course of the twentieth century, the courts were required for the first time to consider the Second Amendment in light of legislative changes that could restrict the right of the people to keep and bear arms. The courts maintained that despite the disappearance of the traditional state militia system, the Second Amendment guaranteed the right to keep and bear arms under the auspices of collective military duty, an interpretation that aligned with prior rulings and codified the collectivist reading of the Second Amendment. Up to this point, court cases concerning gun legislation were relatively rare and the Supreme Court had ruled on the right to bear arms only a handful of times. In *U.S. v. Cruikshank* (1876) – though it was a First Amendment case – the Supreme Court established a states' rights position on the Second Amendment, ruling that "bearing arms for a lawful purpose" was a common-law right, not a constitutional right, which was correctly understood as bearing arms in order to participate in a well-regulated militia; further, the Second Amendment presented no obstacle to laws regulating firearms carriage. Finally, the Second Amendment "means no more than that it shall not be infringed by Congress," indicating that it limited federal, not state, power.[441] The Court reaffirmed its position in *Presser v. State of Illinois* (1886): first, the right to bear arms was protected only in connection to militia service, regulated by the states and the federal government; and second, the Second Amendment did not apply to the states. Further, the Court provided a comprehensive definition of the militia, asserting that private citizens did not have the right to organize militias independent of state or federal authority, as "military organization and military drill and parade under arms are subjects especially under the control of

[441] *U.S. v. Cruikshank* (1876).

the government of every country."[442] Finally, using reasoning similar to *Cruikshank* and *Presser*, the Court ruled in *Miller v. Texas* (1894) that a Texas law restricting "the carrying of dangerous weapons" did not violate the Second Amendment and reiterated that the Second Amendment did not apply to the states.[443] The position established by the Supreme Court in the nineteenth century, then, made clear that the Second Amendment protected the right of the states to arm their militias and did not guarantee the right to keep and bear arms beyond military service.

Upholding Precedent

This jurisprudence would be reasserted in the twentieth century, and expanded to include the people as a collective body. The Supreme Court once again interpreted the Second Amendment as "generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security;" further, "the Second discloses that this right has reference only to the keeping and bearing arms by the people as members of the state militia or other similar military organizations provide by law."[444] *United States v. Miller* (1939) challenged the constitutionality of the National Firearms Act of 1934, which limited access to certain arms through a taxation system that regulated the manufacture, sale, and transfer of weapons, including sawed-off shotguns, machine guns, and gun silencers. Defendants Jack Miller and Frank Layton were accused of transporting an unlicensed 12-gauge sawed-off shotgun across state lines. The Arkansas district court overruled their indictment on Second Amendment grounds as well as an unconstitutional use of commerce power, leading the government to appeal to the Supreme Court. Solicitor General Robert Jackson wrote the government's brief, which

[442] *Presser v. State of Illinois* (1886).
[443] *Miller v. Texas* (1894).
[444] Brief of the United States, *U.S. v. Miller*, 307 U.S. 174 (1939).

centered on the argument that the Second Amendment was a collective right of the people for common defense and safety. Jackson referred to *State v. Buzzard* (1842), which upheld Arkansas's ban on carrying concealed weapons: *Buzzard* asserted that the Second Amendment was intended to protect arms-bearing in relation to the state militia and the states were permitted to regulate accordingly; further, *Buzzard* made clear that the Second Amendment did not protect an individual right to bear arms, as it did not "enable each member of the community to protect and defend by individual force his private rights against every illegal invasion."[445] For the government, the Second Amendment was intended to protect the people's collective right to serve in the state militia in the spirit of well-regulated liberty, thus the National Firearms Act did not violate this right.

The Supreme Court upheld the National Firearms Act and affirmed its previous position that the Second Amendment protected the states' right to arm their militia; further, the Court expanded this interpretation to protect the right of the people to bear arms in collective military service. The Court reiterated the importance of the state militia system in interpreting the Second Amendment:

> The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia – civilians primarily, soldiers on occasion.[446]

The weapon in question, a sawed-off shotgun, bore no relation to a gun used in the militia; since Miller's weapon was not "part of the ordinary military equipment" and it was not used to "contribute to the common defense" through militia service, Miller did not have the right to bear

[445] Brief of the United States, *U.S. v. Miller*, 307 U.S. 174 (1939).
[446] *U.S. v. Miller* (1939).

this type of weapon. Writing for the unanimous majority, Justice James Clark McReynolds explained:

> In the absence of any evidence tending to show that the possession or use of "a shotgun having a barrel less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[447]

The Court's decision rested on two criteria: first, if the weapon in question was a type commonly used in military service; and second, if this weapon was, in fact, being used as part of a well-regulated militia. Miller's sawed-off shotgun met neither condition, meaning that the Second Amendment did not guarantee the right of Miller to bear a sawed-off shotgun across state lines. In considering the type of weapon and its usage (a military-grade weapon being used in military service), the Court not only established the parameters of the Second Amendment, but provided a test for evaluating weapons in the future: a criminal could not, for example, claim he was protected under the Second Amendment because his gun was the same as a standard-issue National Guard weapon, as this firearm must then be used in official Guard activity. A similar argument was made in 1942 by the Third Circuit Court of Appeals in *U.S. v. Tot*, which reiterated the Second Amendment protected the collective right of the people to keep and bear arms as part of a well-regulated militia:

> It is abundantly clear both from the discussions of this amendment contemporaneous with its proposal and adoption and those of learned writers since that this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.[448]

[447] *U.S. v. Miller* (1939).
[448] *U.S. v. Tot*, 131 F.2d 261 (Third Circuit, 1942).

In sum, the Supreme Court codified the position established by the states and the federal government in early twentieth century firearms legislation that interpreted the right to bear arms as a collective right of the people under the auspices of military service. The collectivist position would hold as the accepted understanding of the right to keep and bear arms until it was challenged mid-century as the question of gun rights escalated to a pressing political issue.

Sowing the Seeds

For the first time in American history, the constitutional right to bear arms received national attention in response to the increase in violent gun crimes and the subsequent firearms regulation that followed. Historically, the gun in America had been a symbol of a virtuous citizenry, well-trained in arms and committed to republican values and the common good. Early in the twentieth century, however, certain weapons (such as pistols and machine guns) came under criticism, which increased scrutiny of both the weapon and the shooter. As scholar Timothy Dwight explained:

> To trust arms in the hands of people at large, has, in Europe, been believed…to be an experiment fraught only with danger. Here by a long trial it has been proved to be perfectly harmless…if the government be equitable; if it be reasonable in its exactions; if proper attention is paid to the education of children in knowledge, and religion, few men will be disposed to use arms unless for their amusement, and for the defence of themselves and their country.[449]

The right to bear arms, then, was largely understood in the context of proper regulation. The Second Amendment's protection of the people's collective right to bear arms stipulated that it must be "well regulated," thus the Second Amendment was not considered antithetical to gun regulation. The refusal of gun owners to comply with the new scheme of gun regulation was not

[449] Timothy Dwight, *Travels in New-England and New-York*, volume I (London, UK: William Baynes and Son, 1923), xiv.

viewed as an exercise of Second Amendment rights, but a violation of law. Referring to the practice of registering guns, Senator Homer Cummings wrote, "No honest man can object to it. Show me the man who does not want his gun registered and I will show you a man who should not have a gun."[450] The Supreme Court sanctioned this view, establishing that the people as a collective body were guaranteed the right to bear arms in the context of military service, but the states, under their police powers, were entitled to regulate weapons according to their own discretion. The collectivist view would be challenged, however, in the latter half of the twentieth century, and the Supreme Court would, in turn, drastically change its traditional interpretation of the Second Amendment.[451]

One of the overarching themes that underscores the political development of the Second Amendment is a classic *if-then* scenario: if debate about the meaning of the Second Amendment and how it should be applied to the emerging issue of gun control was, historically, relatively balanced, then how did it escalate into the contentious and politically polarizing dispute so familiar in contemporary American politics? Much has been made about the role of the Supreme Court in answering this question– and the Court's position is, indeed, a crucial element to understanding how the issue of gun rights is debated and resolved in American politics – but it is not the most important factor. Over the first half of the twentieth century, changes outside of the courts, including the rise of gun violence and, in response, the comprehensive federal gun legislation that followed, would allow for a key political force to emerge: the gun rights

[450] Homer Cummings, "Speech of 5 October 1937," *Selected Papers of Homer Cummings, Attorney General of the United States, 1933-1939* (New York, NY: Charles Scribner, 1939), 83-89.

[451] Accounting for decades of previous jurisprudence and revisiting the historical sources that support the collectivist argument not only establishes the legal provenance of the Second Amendment, but makes clear that the Court was misguided in reinterpreting the Second Amendment as an individual right – suggesting that, in the future, the question of the right to keep and bear arms should be decided through the legislative process, not by the courts. For further analysis, see Chapter Ten and the Conclusion of this dissertation.

movement. This development would profoundly alter the debate about the parameters of the Second Amendment and the proper scope of gun control, and escalate the question of who, and under what circumstances, was constitutionally protected to keep and bear arms in modern America.

Chapter Eight:

The Rise of the Gun Rights Movement

The concept of "gun rights" is an idea unique to modern American politics. For much of the nation's history, gun ownership was widely accepted and legally protected. The right to own a gun was guaranteed by the Second Amendment under the auspices of a well-regulated militia, interpreted as the people's collective right to bear arms in state-mandated military service; further, it was safeguarded under the common law tradition of the states through their regulatory police powers. In other words, there was no need for a robust notion of gun rights because the right to keep and bear arms was an established part of American public life, regulated by the states and the federal government to balance concerns of public safety with the interests of gun owners. Following increased gun legislation in the first half of the twentieth century, however, the gun rights movement emerged in response to the intersection of several factors, including increased interest in, and access to, weapons across the nation, the rise in gun-related crimes, and fears that legislation meant to mitigate gun violence would unduly restrict the rights of gun owners.

Over time, what began as relatively moderate debate about the parameters of the Second Amendment – and how it should be applied to the increasingly salient question of gun control – transformed into one of most contentious and highly partisan issues in contemporary American politics. Taking a stance on guns would become a loaded political issue, indicating not only an opinion on gun control, but also a position on the nature of rights in contemporary America and the proper scope of government intervention in defining those rights. The politicization of the National Rifle Association was a pivotal factor to account for these changes. As the NRA shifted from a sporting association to a highly organized and efficient gun lobby, the question of

gun rights was escalated to the national stage and, for the first time, became a highly divisive partisan issue – with Republicans aligning with gun rights activists to limit regulation and Democrats advocating increased gun control – that relied on radically different interpretations of the Second Amendment to justify competing political claims.

The Role of Guns in American Public Life

While gun control measures introduced in the first half of the twentieth century addressed concerns about crime and violence, guns were still widely accessible to the American people, many of whom embraced guns as a popular leisure pastime. Following World War II, gun ownership increased as citizens became more interested in shooting for sport, including hunting and target practice. Hunting licenses increased, as well renewed enthusiasm for sporting associations. There was also a newfound curiosity in gun history, with collectors keen to procure rare antique guns and accoutrements, particularly related to past wars.[452] Thus the post-war gun owner was not limited to a militiaman armed with a musket or a private citizen possessing a pistol for self-defense, but included those interested in the many facets of gun ownership linked to recreational pursuits and personal interests. Now a "gun buff," a "part time collector, spare-time shooter, he avidly read the popular shooting magazines and he attended the gun shows held in countless armories and exhibition halls all over the country."[453] In response to increasing demand, the gun industry enjoyed healthy growth in the 1940s and 1950s. Small arms increased in sale domestically as well as gun exports, antique weapons were sold at auction and between private buyers, and the federal government continued its tradition of selling surplus guns to sporting clubs. That said, if guns were relatively commonplace post-war, then most Americans

[452] James E. Serven and James B. Trefethen, eds., *Americans and Their Guns* (Harrisburg, PA: The Stackpole Company, 1967), 250-289.
[453] Lee Kennet and James LaVerne Anderson, *The Gun in America* (Westport, CT: Greenwood Press, 1975), 220.

were comfortable with regulating those weapons. A Gallup Poll from 1959 demonstrated that while gun ownership was common, it was not antithetical to regulation: the poll revealed that there was a gun in roughly half of American households and that 75% of respondents favored some degree of regulation, primarily that a permit should be required to purchase a gun.[454]

The Traditional Sportsman

The interest in guns for leisure pursuits and a robust arms market dovetailed with renewed interest in sporting associations, most notably the National Rifle Association. Founded in 1871 by New York National Guardsmen Colonel William C. Church and George W. Wingate, the NRA's mission was to inculcate best practices regarding firearms, emphasizing proper training, safety, and skills in handling guns. Initially organized at the state level, the NRA expanded in 1900, when influential member Albert S. Jones (also a member of the New Jersey National Guard) proposed a national association that emphasized gun safety and marksmanship.[455] The federal government was enthusiastic about this arrangement, establishing the National Board for the Promotion of Rifle Practice in 1903 and passing legislation in 1905 to allow surplus weapons and ammunition to be sold to rifle clubs. The NRA worked with the military to organize marksmanship training and petitioned for federal funding for rifle and gun clubs to provide practice facilities and military training.[456] At this juncture, the NRA was seen as a vital civic institution committed to educating citizens to the importance of correct training and marksmanship, both for sport and for national defense. As Secretary of State Elihu Root said in

[454] Arthur Grahame, "Gallup's Poll on Guns," *Outdoor Life* 124 (October 1959): 12.
[455] Serven and James B. Trefethen, eds., *Americans and Their Guns*, 113-115.
[456] "Rifle Practice for Civilians," *American Rifleman* (March 1961): 14.

1908, "that the young men of America shall know how to shoot straight is one of the fundamental requirements of our scheme of national defense."[457]

Over time, the NRA became increasingly professionalized, sponsoring membership drives and encouraging smaller local hunting clubs to join ranks. The NRA also began to organize politically; by the time debate commenced in 1934 regarding the National Firearms Act, the NRA was the most visible and motivated group of firearms advocates present in Washington to discuss the bill, when the NRA's executive vice-president General M.A. Reckord was described as "the most influential man in this country in opposition to firearms legislation."[458] Despite its nascent entry into American politics, however, the NRA retained its traditional position as a sporting group committed to firearms proficiency and civic duty; its official publication, *American Rifleman*, refused to advertise what it considered extreme weapons, such as bazookas and anti-tank guns, for which the American rifleman would have no appropriate use, and discouraged the "quick-draw craze."[459] Membership literature often included articles about gun safety and cartoons featuring characters such as "Tipper Flintlock," who espoused members to be responsible with rhyming reminders: "The sport of hunting can be fun, so don't be careless with your gun."[460] The NRA supported reasonable gun regulation intended to prevent injury and death due to firearms, but maintained that better training practices – rather than restrictive laws – would be most effective in curtailing the dangers posed by guns. They compared gun mishaps to car accidents; NRA executive director Merritt A. Edson explained:

> A gun, just like an automobile, can be dangerous unless the operator has been taught how to handle it safely. A gun, just like an automobile, can be used for unlawful purposes

[457] Elihu Root, in Serven and James B. Trefethen, eds., *Americans and Their Guns*, 142.
[458] United States Senate, *Hearings* (1934), 16.
[459] "The Quick-Draw Craze," *American Rifleman* (February 1959): 14.
[460] "Tipper Flintlock Conducts a Safety Shooting Campaign," *American Rifleman* (December 1961): 31.

> unless the operator has been convinced that crime does not pay. These are the essential truths on which gun legislation should be based.[461]

In sum, the post-war period was a time of widespread gun ownership and enthusiastic support of firearms for a variety of reasons, including sport, self-defense, and other private pursuits. The majority of gun laws fell under the auspices of state governments and primarily required registration and permits. By the 1960s, however, guns and their owners came under increased scrutiny due to a rise in hunting accidents, gun-related crimes, and high profile assassinations, calling into question the role of the gun in contemporary America and testing the parameters of the Second Amendment as the debate about guns became increasingly contentious.

Guns Under Fire

With guns readily available and permit practices relatively relaxed, it was simple for citizens to procure guns for hunting or target shooting – or for criminals to obtain weapons for nefarious activities. The 1960s marked a critical juncture for the right to keep and bear arms as attitudes toward weapons began to shift following an increase in hunting accidents, a sharp rise in gun crimes, and a series of high profile assassinations. Despite the increased popularity of the NRA and other sporting groups, many gun owners were poorly trained in gun safety and marksmanship, resulting in accidents and injuries that led critics to question the soundness of shooting for sport. Sceptics of recreational shooting warned against "quick draw" accidents in which overly enthusiastic shooters accidently injured themselves with live ammunition.[462] Many amateurs were wounded in hunting accidents as well; for example, a retired General Motors executive was accidently shot while duck hunting, with *Life* later describing this tragedy as "a

[461] Merritt A. Edson, "Education versus Legislation," *American Rifleman* (March 1955): 16.
[462] Stanley Meisler, "Dodge City Syndrome," *The Nation* (4 May 1955): 15.

grimly dramatic illustration of the toll among today's mushrooming multitude of hunters."[463] Critics also objected to hunting on moral grounds, as well as citing environmental concerns.[464]

While sporting accidents were a public safety concern, it was the rise of gun crimes and high-profile assassinations that brought the issue of guns to the forefront of American politics. Guns became an increasingly topical issue as racial tensions and urban violence increased in the 1960s, including the rise of juvenile crime. For example, *The New Republic* cautioned in 1956 that escalating racial tensions were contributing to the increase in firearm sales in the South.[465] It was the assassination of President John F. Kennedy, however, that dramatically changed the national tone regarding gun regulation. The Italian Carcano M91/38 rifle used by Lee Harvey Oswald was purchased through the mail under the false name from a company advertised in *American Rifleman*. (Sadly, it was then-Senator Kennedy in 1958 who supported legislation to prohibit the importation of foreign made guns, including the Carcano rifle, which did not pass.)[466] At the time of President Kennedy's assassination, the New York legislature had been considering measures to loosen the Sullivan Bill; in wake of the tragedy, however, the Committee on Firearms and Ammunition approved a series of amendments to strengthen the law, adding an amendment that declared it a felony to carry a loaded firearm. As the demand for more restrictive gun regulation increased, many gun rights activists took issue with further regulation, claiming that the American people were merely looking for a scapegoat for the President's death. As one gun rights supporter opined, "the victim for revenge apparently is the honest, law-abiding citizen who hunts, shoots skeet and trap, target shoots, collects guns, and

[463] "A Hunter's Heartbreak," *Life* (30 November 1959): 41.
[464] Durward L. Allen, "Growing Antagonism to Hunting," *Field and Stream* (September 1963): 12-16.
[465] "Sale of Firearms," *The New Republic* (18 June 1956): 2.
[466] Joseph F. Dinneen, Jr., "An Ironic Twist to Assassination," *Boston Globe* (Boston, MA), 8 December 1963, 78.

desires to protect his home and business."[467] This debate would only intensify as gun owners felt their rights increasingly challenged by gun control advocates.

The Plague of Guns

Responding to the political environment, Carl Bakal (United States Army veteran and journalist) was one of the first critics to present a comprehensive account of the dangers posed by guns in contemporary America, making a fervent argument for limiting access to firearms for the sake of the public good. Writing in 1966, Bakal began his book by recounting a series of recent gun tragedies, claiming that "in no other country of the world do so many people kill and maim each other – and themselves – with firearms."[468] But it wasn't until the assassination of President Kennedy that the American people became aware of the "plague of guns."[469] Bakal posed a series of questions to frame his inquiry, which soon became widely debated political challenges as the issue of guns escalated in Congress:

> Why does a civilized society allow deadly weapons to be readily available to everyone?
>
> Why is the subject of firearms control one of such seething controversy? Who are those who oppose control?
>
> Is the so-called constitutional right "to keep and bear arms" so absolute that it can infringe on an even more fundamental right of people – the right to live?[470]

Prior to addressing these questions, Bakal first tracked inconsistencies between state gun laws and provided several examples of how simple it was to illegally purchase weapons through the mail, including his own test of ordering a Carcano rifle from *American Rifleman*.[471] Bakal

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[467] Al Bennet, "Outdoor Life," *Bridgeport Post* (Bridgeport, CT), 15 December 1963, D5.
[468] Carl Bakal, *The Right to Bear Arms* (New York, NY: McGraw-Hill, 1966), 1.
[469] Bakal, *The Right to Bear Arms*, 5.
[470] Ibid., 6.
[471] Decades later, political scientist Robert Spitzer conducted a similar experiment, also in New York. Spitzer wanted to experience the process of remotely purchasing and assembling a "featureless" AR-15, a weapon that was technically legal under the New York Secure Ammunition and Firearms Enforcement Act of 2013 (SAFE), one of the country's most restrictive gun laws. The weapon was purchased from an out-of-state dealer, then delivered to a

recounted that when the gun arrived, "my wife received the package. But it could just as well have been my three-year-old daughter. Since no license is required for a rifle or shotgun in New York, no law was broken by this transaction," though the thought that a three-year-old, a criminal, or someone mentally unstable could so easily procure a weapon was "frightening."[472]

Bakal was also concerned with the rise in juvenile crime, articulating fears that as the younger demographic increased in size, the prevalence of gun-related crimes would only increase.[473] Bakal cited the 1959 hearings of the Senate Subcommittee on Juvenile Delinquency responding to "an epidemic of crime committed by teenagers," concluding that:

> As our investigation progressed, it became apparent that a major source of firearms to juveniles and young adults was the mail-order common carrier route…not only juveniles were availing themselves to this source of firearms, but also young and adult felons, narcotic addicts, mental defectives, and others of generally undesirable character.[474]

The "world of guns" involved many groups, including hunting enthusiasts, conservation groups, gun clubs, weapons manufacturers, and "assorted superpatriotic groups," resulting in a "loose alliance [which] exerts an influence far greater than its true proportion of the country's population."[475] With so many points of entry, Bakal was troubled that young people and criminals would have unfettered access to guns. He took particular aim at the NRA for encouraging wide availability to firearms: "The patriotic phrase exhorting Americans to exercise 'The Right to Bear Arms' is also as enviable a rallying call as any organization could want,

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local seller with a federal firearms license. Spitzer and a colleague easily assembled the component parts of the assault rifle, which were "like Legos for grownups because you can adapt them for different calibers, different barrel stocks, with just a few simple tools." Similar to Bakal, Spitzer noted that obtaining such a weapon was simple, even with strict regulations in place, and concluded that "for those interested in acquiring one, a legal assault weapon under the state's new law enacted in 2013 is accessible, available, and feasible." See Robert J. Spitzer, *Guns Across America* (New York, NY: Oxford University Press, 2015), 143-146.

[472] Bakal, *The Right to Bear Arms*, 19.

[473] Ibid., 32-33.

[474] Ibid., 34-35.

[475] Ibid., 94.

although to the NRA it is evidently of little consequence who chooses to answer the call."[476] Bakal made clear that the newly emerged gun lobby was largely responsible for interfering with effective gun legislation, which Congress would be wise to correct immediately:

> The gun lobby refuses to recognize the correlation between strict firearms controls and the low incidence of firearms deaths where controls are in effect…it protests that controls are an inconvenience. It cloaks its objections in the "patriotic" raiment of protection, both the national security and constitutional rights. But it masks its real objectives, which stem from monetary motivations, as well as vague, misguided fears.[477]

Bakal was one of the first scholars to issue a sweeping criticism of guns in America and recommend federal legislation to address the problem, but the national tone regarding gun regulation quickly followed suit in the wake of increased crime.

The NRA Responds: Striving for Balance

The NRA, no longer viewed as merely a sporting association, came under increased criticism for its role in encouraging widespread gun ownership; in response, the NRA intensified its campaign to protest prohibitive gun laws by utilizing several tactics, including grassroots efforts to mobilize members to political action. The NRA's Legislative Reporting Service tracked proposed gun laws and informed leaders of NRA-affiliated gun and sports clubs, who then alerted their members. Also, hunting and gun publications often included mention of pending gun laws and encouraged readers to protest. For example, a widely circulated article by journalist Ralph McGill criticized the NRA for its attempts to block legislation that would limit the interstate mail order of guns: "The NRA, with a curiously naïve attitude about the freely available supply of weapons, opposes all, or almost all, regulations such as registration and licensing."[478] Many gun publications referenced the article and in response, activists wrote a

[476] Bakal, *The Right to Bear Arms*, 292-293.
[477] Ibid., 329.
[478] Ralph McGill, "Machine Guns for Everyone," *Atlanta Constitution* (Atlanta, GA), 14 April 1962, 1.

flurry of letters and phoned local newspaper offices to protest the article as an "affront to all liberty loving good citizens."[479]

Still, as a political strategy, the NRA often advocated for compromise rather than outright protest by presenting lawmakers with a variety of alternative options. For example, if the NRA opposed a particular gun law, they would encourage lawmakers to (ideally) abandon the proposal; if refused, they would suggest that the NRA play a broader role in providing gun training rather than advancing new restrictive laws, or they could provide an amended plan that was less onerous to law-abiding gun owners. Overall, the NRA thought it prudent to take a balanced approach, especially in light of the escalating political debate about guns. NRA executive vice-president Franklin L. Orth pledged the NRA's commitment to law and order through gun education and training, hoping that Congress would utilize the NRA's long history of "the responsible use of firearms…in formulating effective gun legislation."[480]

The NRA was forced to change tactics, however, when it became clear that loopholes in existing legislation allowed guns to easily fall into the hands of criminals. It was already prohibited for citizens to buy and sell concealable weapons through the United States Postal Service, but, because there was no federal law prohibiting the interstate mail sale of non-concealable firearms, nothing barred buyers and sellers from using private mail carriers. As a result, the mail-order purchase and sale of guns was commonplace and increasingly used by young people and criminals. The Federal Firearms Act of 1938 was amended in 1961 to prohibit the sale or transport of any firearm by anyone who had been convicted of a crime with a prison term greater than one year, but this did little to curtail the mail-order of weapons across state

[479] H. Chris Cartwright, "Rifle Group is Defended," *Southern Illinoisan* (Carbondale, IL), 22 April 1962, 26.
[480] Franklin L. Orth, "Right Upheld to Bear Arms," *New York Times* (New York, NY), 3 December 1963, 3.

lines.[481] Calls for more sweeping federal firearms controls increased in intensity, leaving gun rights activists in a precarious situation.

The Gun Control Act of 1968

In response to concerns about escalating gun crimes, Congress commenced debate regarding the flaws in the current scheme of federal firearm legislation and possible solutions to curb the nation's crime wave. At the time, the Treasury Department was tasked with enforcement of the National Firearms Act of 1934 and the Federal Firearms Act of 1938, but claimed it could not effectively meet its mandate. Further, earlier legislation required the states to take responsibility for establishing a permit system and maintaining registration records, but only a handful of states had implemented permit programs, meaning that guns were easy to procure with little oversight. Of particular concern was the prevalence of inexpensive mail-order weapons (known as "Saturday night specials") shipped to individuals and licensed gun dealers, who could sell them at their discretion. Efforts to reform federal firearms regulation were spearheaded by Connecticut Senator Thomas J. Dodd, chairman of the Senate Subcommittee on Juvenile Delinquency. Senator Dodd focused on the problem of Saturday night specials, which were often imported to the United States piecemeal, hastily assembled, and sold through magazine advertisements at a discounted price.

Dodd and his committee conducted meetings with an array of interested groups, including gun safety advocates and sporting groups. They also met with representatives from the domestic gun industry and the NRA, both of whom endorsed his mission: gun manufacturers wanted to regulate mail-order pistols to decrease competition; the NRA supported Senator Dodd

[481] "Crime Legislation Sent to White House," *Los Angeles Times* (Los Angeles, CA), 20 September 1961, 4.

because such weapons, often used in criminal activity, delegitimized the more lawful pursuits of hunting and shooting. The NRA made its stance clear:

> It is the position of the NRA that no gun commits a crime – the user is the culprit. Therefore, there should be laws which would punish severely the convicted offender on a mandatory basis if the crime involved the use of firearms. This principle places the burden on the offender, and does not affect the law-abiding citizen in the enjoyment of his freedom guaranteed under the Second Amendment of the Constitution.[482]

The NRA, among other pro-gun groups, spoke before the committee and clarified that they objected only to legislation that would unduly restrict law-abiding gun owners. Franklin L. Orth, executive vice-president of the NRA, testified: "I do not deny you have a problem with mail-order guns, Senator. We want to do everything we can to help you. We will support any reasonable type of legislation to beat that type of business because it is unconscionable."[483] Further, "we do not think the proper use of firearms in recreation, law enforcement, and national preparedness should be overshadowed or tainted by the same black brush that is being wielded against a small minority of lawless individuals."[484] *American Rifleman* affirmed that the NRA was committed to reasonable regulation that limited the availability of mail-order guns to "irresponsible merchants and purchasers" while assuring that "due caution must be exercised so that law-abiding citizens are not severely penalized or deprived of their individual rights."[485]

Senator Dodd's bill was formally presented in August 1963 as an amendment to the National Firearms Act of 1938, specifically targeting the importation and mail-order sale of inexpensive pistols. The amendment set out a more rigorous licensing system with harsher

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[482] "Rifle Association Opposes Gun Registration, but Favors Control of Sales," *Cincinnati Enquirer* (Cincinnati, OH), 12 December 1963, 18.
[483] Reported by John W. Coggins, Alcohol and Tobacco Tax Division, Internal Revenue Service*, Dodd Committee Hearings* (1963), 3481-3483.
[484] Ibid.
[485] "Mail-Order Guns," *American Rifleman* (August 1963): 16.

penalties for non-compliance: gun dealers, who must be at least twenty-one years old, would be required to pay a larger fee to acquire licenses; sellers could not ship mail-order weapons across state lines without full disclosure of their cargo; such weapons could only be sold to someone over eighteen years old; and finally, buyers would be required to provide notarized documentation that they were of age and without a criminal record.[486] Once submitted, however, the process slowed and the bill was waiting in the Senate Committee on Commerce when President John F. Kennedy was assassinated.

In the wake of the national tragedy and public outcry for more stringent gun regulation, Senator Dodd added further strictures to his proposed bill. The revised bill was no longer limited to pistols, but included all mail-order weapons; further, the purchasing process now required the potential buyer to include the name of his local police chief, who would be informed of the transaction prior to shipment.[487] Dodd's proposal garnered wide support, including that of the NRA, but not without misgivings: *American Rifleman* opined that "never before has there been such a wave of anti-firearm feeling, or such vocal and almost universal demand for tighter controls over the mail-order sales of guns."[488]

A Shift in Tone

Still, discussion of the new bill revealed changing attitudes toward gun regulation, which shifted from cautious cooperation between those in favor of gun restrictions and those seeking to protect law-abiding gun owners to a polarized debate between those "for" or "against" guns, gradually splitting along party lines. Further, it was the first time that debate about gun regulation invoked the Second Amendment. In a particularly dramatic hearing, Representative

[486] United States Senate, Committee on Commerce, *Interstate Shipment of Firearms, Hearings* (1963-1964), 2-5.
[487] Ibid., 5-7.
[488] "Realistic Firearms Controls," *American Rifleman* (January 1964): 14.

John Lindsay of New York arrived at Congress brandishing a Carcano rifle. Lindsay declared that changes in modern America, including modernized police forces, demographic shifts, and increased access to deadly weapons, demanded that the right to bear arms to be highly regulated:

> Today the Nation no longer depends on the citizen's weapon, nor does the citizen himself. And, most significant, the population is now densely packed into urban areas, and it is diverse and mobile. In our changed and complicated society, guns have become more dangerous, and they demand more careful use. The Constitution must be interpreted in the light of the times; protection today means the reasonable regulation of firearms – not the absence of regulation.[489]

In other words, for Representative Lindsay and his supporters, the context of keeping and bearing arms in current times had changed so drastically from the Founding – particularly the reliance on armed state militias to secure liberty – that the regulation of weapons should also change accordingly; the Second Amendment must not be an impediment to the reasonable regulation of firearms. As debate intensified, the issue changed from mail-order weapons in particular to guns in general, further polarizing the terms of the argument: on the anti-gun side, many argued that all weapons, used for any purpose, should be restricted; on the pro-gun side, many abandoned their moderate position to advocate for a more robust right to bear arms. As commentator Roger Caras later described, "any careful observer of the battle must be distressed at the ignorance, ill will, and dishonesty apparent on both sides," a perspective that would anticipate the increasing contentious tone about gun rights and underscore the partisan divide on gun regulation.[490]

Finally, the Omnibus Crime Control and Safe Street Acts was signed into law in June 1968 and later integrated into the Gun Control Act of 1968, which effectively replaced the

[489] United States Senate, Committee on Commerce, *Interstate Shipment of Firearms, Hearings* (1963-1964), 234.
[490] Roger Caras, *Death as a Way of Life* (Boston, MA: Little, Brown, and Company, 1970), 122.

Federal Firearms Act of 1938. The Act established a comprehensive system of gun regulation based on interstate commerce powers that imposed restrictions on the shipment of weapons across state lines, prohibited certain groups from purchasing weapons, and increased regulations on the purchase and sale of weapons. The bill contained three main sections: a licensing system; limitations on foreign imports; and restrictions against criminals owning firearms. The licensing system was designed to regulate the interstate distribution of guns, requiring gun manufacturers and dealers to adhere to rigorous licensing procedures which increased the licensing fee and age requirements to purchase weapons and ammunition. Next, the Act limited foreign imports and extended registration and tax requirements to include "destructive devices" such as bazookas, anti-tank guns, and other war devices. Finally, the Act prevented criminals from purchasing guns by establishing a class system of criminals restricted from buying or selling guns across state lines. Licensed gun dealers were prohibited from selling weapons to criminals; finally, anyone using a firearm to commit a federal felony would be charged a further penalty.[491] This comprehensive piece of legislation, a success for gun control advocates, would motivate gun rights groups to organize politically and escalate the question of gun rights to the national stage.

America as a Gun Culture

Following the passage of the Gun Control Act, the NRA – who described the Gun Control Act as "the most sweeping Federal legislation ever imposed on U.S. firearms owners" – found itself increasingly isolated in American politics as the nation's position on guns changed from benevolent tolerance to active opposition.[492] Throughout this pivotal time, tensions between the states, political differences between rural and urban areas, and regional racial

[491] The Gun Control Act (1968).
[492] "New U.S. Law Limits All Gun Sales," *American Rifleman* (December 1968): 17.

conflicts contributed to the shifting attitude toward guns. It was at this juncture, as well, that the federal government established the Bureau of Alcohol, Tobacco, and Firearms and Explosives to enforce gun laws, furthering federal influence over what had traditionally been a state prerogative. One of the most emblematic documents describing the challenges of this time was historian Richard Hofstadter's well-known article "America as a Gun Culture." Following the passage of the Gun Control Act of 1968, Hofstadter reflected on the convergence of gun ownership with the current political environment underscored by regional and racial tensions. Hofstadter wrote:

> The most gun-addicted sections of the United States are the South and the Southwest. In 1968, when the House voted for a mild bill to restrict the mail-order sale of rifles, shotguns, and ammunition, all but a few of the 118 votes against it came from these regions. This no doubt has something to do with the rural character of these regions, but it also stems from another consideration: in the historic system of the South, having a gun was a white prerogative.[493]

Anticipating what would be the central dilemma regarding the interpretation of the Second Amendment and its application to gun control, Hofstadter went on to argue:

> Many otherwise intelligent Americans cling with pathetic stubbornness to the notion that the people's right to bear arms is the greatest protection of their individual rights and a firm safeguard of democracy – without being in the slightest perturbed by the fact that no other democracy in the world observes any such "right…"[494]

Hofstadter described the problems inherent to a "gun culture," a situation that was, lamentably, unique to the United States. A society that allowed for widespread gun ownership would be rife with violent crimes, and, in the case of modern America, patterns of violence would reflect the broader problems of social and racial tensions, as urban populations, with easy access to both domestic and foreign weapons, would be tempted to succumb to gun violence. Hofstadter wrote:

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[493] Richard Hofstadter, "American as a Gun Culture," *American Heritage* 21 (October 1970): 4-11, 82-85.
[494] Ibid.

"With groups like the Black Panthers and right-wing cranks like the Minute Men, not to speak of numerous white vigilante groups, well armed for trouble, the United States finds itself in a situation faced by no other Western nation." Guns posed both tangible and symbolic problems, contributing not just to urban violence, but perpetuating a national myth that was no longer relevant; for Hofstadter, the gun as a talisman of American individualism was not a celebration of personal liberty, but a sign of the erosion of true American values. Referring to cultural heroes, Hofstadter wrote "the United States has shown an unusual penchant for the isolated, wholly individualist detective, sheriff, or villain," with conflict being resolved not through reasonable measures but by "ready and ingenious violence."[495] This radical individualism was particularly problematic in the South. Hofstadter attributed the issue of gun violence in the South partly to its expansive rural areas, but also a reflection of its history of slavery because "having a gun was a white prerogative." Regional tensions in the South had become a national issue; after being denied the right to bear arms following the Civil War, "it is hardly surprising…to see militant young blacks borrowing the white man's mystique and accepting the gun as their instrument." Quoting a young black man, Hofstadter noted the egalitarian attitudes toward guns: "What's happening today is that everybody's getting more and more equal because everybody's got one."[496] For Hofstadter, the prevalence of guns was the nation's greatest ill, escalating regional and racial tensions to a tipping point.

Hofstadter's article was one of many examples of the attack on guns in America.[497] In response, the NRA and other gun rights groups were galvanized to secure their position as the

[495] Hofstadter, "American as a Gun Culture."
[496] Ibid.
[497] For example, see Carl Bakal, *The Right to Bear Arms* (New York, NY: McGraw Hill, 1966); Robert Sherrill, *The Saturday Night Special* (New York, NY: Charter House, 1973); and George D. Newton and Franklin E. Zimring, *Firearms and Violence in American Life* (Washington, D.C.: United States Government Printing Office, 1970).

defender of the right to keep and bear arms. This was an tactical shift: historically, the NRA supported reasonable gun legislation as part of a well-regulated political society; as their mission focused on safe gun use and civic duty, they viewed themselves as national institution devoted to American patriotism and love of liberty – but largely outside the political fray:

> The National Rifle Association of America has never been, it is not now, nor can it ever be a partisan political organization. Any individual or group of individuals who would attempt to make it such would be doing a disservice to the NRA and to our country as well. On the other hand, the NRA has always been, it is now, and it must continue to be a truly patriotic organization actuated by love of country and devoted to its welfare.[498]

Over time, however, opposition to this moderate position led to internal conflict between leaders and more extreme members, resulting in the eventual reorganization of the NRA's internal structure that led to a more active role in politics as a highly influential gun lobby, closely aligned with the Republican Party.

From Sporting Association to Gun Lobby

The National Rifle Association first entered American politics in the 1930s during congressional debate about the National Firearms Act of 1934. While committed to protecting the right of law-abiding citizens to keep and bear arms for private use, the NRA also espoused reasonable regulation to ensure public safety and the prevention of crimes.[499] For example, the NRA supported laws requiring gun dealers to keep records of the sale of firearms to assist police in quickly tracing a weapon used in a crime. Further, they did not object to regulations requiring a permit to carry a concealed handgun, though they questioned the effectiveness of such

[498] Merritt A. Edson, "In Their Own Keeping," *American Rifleman* (November 1952): 14.
[499] The NRA applied several criteria to determine if a law was "reasonable." First, what was the purpose of the law, and was it enforceable to achieve its purpose? Next, could it be used unjustly to expand governmental power? Further, was it entirely necessary or merely a "technical restriction" that would negatively impact sportsmen? Finally, was the law an overarching prohibition when proper training could solve the specific problem? See "Well-Meaning, but With Little Understanding," *American Rifleman* (January 1957): 14.

measures: "We do not believe that the necessity of a permit to carry concealed weapons will have any appreciable effect on the use of guns by criminals; but if the police believe that such a law will help them, we have no objection to its passage."[500] Despite supporting such measures, however, they opposed statutes requiring a law-abiding citizen to acquire a permit to purchase a gun for private use or any law requiring a gun buyer to be fingerprinted or otherwise tracked. Overall, the NRA was cognizant of crime and safety concerns, but dedicated to protecting law-abiding citizens who wished to acquire weapons for personal pursuits: "We favor sane and reasonable [firearms] legislation, but we unalterably oppose legislation which will 'arm the crook.'"[501]

The NRA had always been fully committed to protecting the right of law-abiding citizens to keep and bear arms and protested any legislation they deemed excessively restrictive, working closely with Congress to protect their interests. In response to increased regulation and a national shift in tone against guns, however, the NRA began in the late 1950s to step away from its cooperative position with Congress to establish a more zealous stance in favor of gun rights. Over its history, members had joined the NRA for a variety of reasons (such as interest in hunting, sport shooting, gun collecting, and self-defense): now, these loosely connected supporters of gun rights needed organization into a cohesive group to be politically efficacious in their pursuit of protecting law-abiding gun owners. In an early attempt to galvanize members to greater political action, the NRA had established the Legislative Reporting Service in 1934, which was responsible for tracking all pending state and federal gun regulation; if they deemed a particular piece of legislation unduly restrictive, they alerted members and encouraged them to

[500] "Merry Christmas – and Gun Laws," *American Rifleman* (December 1929): 6.
[501] "Congratulations, Gentlemen," *American Rifleman* (May 1930): 6.

write letters or appeal directly to their representatives in opposition. Now, under more intense internal criticism, the NRA was prepared to employ more sweeping measures to promote their advancement of gun rights.

Advancing the Cause

Historically, the NRA utilized several tactics to rally its members to protest restrictive legislation, which they continued to apply. First, the NRA cast the legislative "reformers" as weak while the NRA was strong and civic-minded, invoking the "spirit of 1776" as the guardians of Founding traditions. In opposition to reformers who sought to limit access to weapons, their goal was to cultivate proper character and skilled gun handling, to "think straight – to shoot straight – to act straight – and teach others to do the same."[502] For example, NRA president Karl T. Frederick urged gun owners to protest against those reformers intent on disarming all citizens "except the crooks, the racketeers, the gangsters, the police and those few favored persons."[503] Another tactic was to consolidate all gun regulation as restrictive and exaggerate its scope: once any gun regulation was introduced, full disarmament was not far behind, leaving citizens vulnerable to forces beyond their control.

NRA leaders also floated conspiracy theories to motivate their base. They alluded to dark powers at work behind "reasonable regulation" that would completely disarm the American people and undermine cherished political institutions. For example, *American Rifleman* opined:

> We are convinced that the majority of the anti-gun laws are proposed by honest, well-meaning persons, but the continued cropping-up of the sinister influences leads to the belief that these well-meaning persons have been hoodwinked more often than they realize, and are supported…by those forces within and without the United States which

[502] "The Palladium of Our Security," *American Rifleman* (May 1930): 6.
[503] Karl T. Frederick, "Are You Men or Mutton?," *Field and Stream* (February 1932): 13.

> are concerned not at all with the welfare of the American home and American institutions, but rather are bent upon the pilfering and destruction of both.[504]

Further, it was not just American lawmakers intent on disarming the people, but foreign actors as well. Emphasizing threats to gunowners from within the United States as well as abroad introduced a new level of menace: "Communists love this kind of law." It was the "surest way of erecting a dictatorship in the United States or making it possible for a successful soviet invasion, or the invasion of any other enemy power would be first to disarm the victim and make resistance impossible."[505]

Dramatics aside, the most common tactic utilized by the NRA to garner support revolved around crime, arguing that gun regulation was ineffective in preventing criminality; rather, law-abiding gun owners were the best deterrent to crime (a position later made popular in John Lott's 1998 book *More Guns, Less Crime*). If virtuous citizens were well-schooled in both marksmanship and the law, then law-breaking could be "stamped out by an aroused armed citizenry, either called to the aid of the police as possemen, or, as in the days of the Old West, disgusted with corrupt police officers and organized into their own law-enforcement groups – the Vigilantes."[506] This position was popularized in a new column in *American Rifleman*, "The Armed Citizen," which interviewed gun owners who had thwarted crimes to demonstrate that

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[504] "The Sinister Influence," *American Rifleman* (April 1935): 6. In later years, the NRA employed similar language. Following the Morton Grove, IL ban on selling handguns in 1981, the NRA sent a mass mailing warning members that if such measures were allowed to stand, full disarmament was imminent and the sacrosanct protection against search and seizure would be compromised: "The village of Morton Grove, Illinois, has passed the unthinkable – a ban on the private possession of all handguns for all law-abiding citizens – with enforcement permitting the police to *search* any home, to *seize* and *confiscate* strictly on a suspicion that there may be a gun in the home…what was once the unthinkable has become reality…we must stop a possible domino effect…these fanatics must be stopped – NOW!" See the National Rifle Association, *Illinois Legislative Alert* (12 June 1981).
[505] Karl T. Frederick, "Sullivan Law, Boon to Thugs, 40 Years Old," *Chicago Tribune* (Chicago, IL), 1 November 1951, 36.
[506] "The Attorney General is Inconsistent," *American Rifleman* (January 1934): 4.

"law enforcement officers cannot at all times be where they are needed to protect life or property in danger of serious violation."[507]

Under Pressure

Though the NRA was dedicated to protecting its members from unduly restrictive gun regulations, they were not advocating a state of nature in which people were free to walk about fully armed, but emphasized proper weapons training and reasonable regulation. NRA President Fredrick had stated before Congress in 1934: "I have never believed in the general practice of carrying weapons…I do not believe in the general promiscuous carrying of guns. I think it should be sharply restricted and only under licenses."[508] By the late 1950s, however, the NRA and other sporting groups were increasingly concerned that the right to bear arms would soon be curtailed; at the same time, internal disagreements within the NRA led to tensions between leaders and members. As the tone of the national debate about guns became increasingly contentious, NRA leaders had to balance the demands of members for greater gun rights advocacy with its traditional position as a moderate advisor on gun legislation and proponent of reasonable regulation. In the first half of the twentieth century, the NRA had worked closely with the government, purchasing surplus weapons at a discount, offering supplemental military marksmanship training, and using federal funding to build practice ranges for training exercises. Along with monitoring legislation they feared would be unduly restrictive, the NRA emphasized proper training and safety measures to educate the American people to the correct use of guns: "We must prepare ourselves to counter bad ideas with good ideas. We must meet good

[507] Walter J. Howe, "The Armed Citizen," *American Rifleman* (September 1958): 32.
[508] Karl T. Frederick, *National Firearms Act: Hearing before the Committee on Ways and Means House Resolution*, 73rd Congressional Record (Washington, D.C.: 1934), 59.

intentions with proven results, incomplete knowledge with education."[509] In response to internal demands for a more assertive political position, however, the NRA moved away from its moderate relationship with the federal government and shifted its leadership structure, establishing the path to become an influential special interest lobby that would eventually closely align with the Republican Party. This was a gradual but distinct shift in vision, evident in the NRA's most prominent publication, *American Rifleman*, which replaced its editor in 1966 and advanced a more aggressive tone toward promoting gun rights and limiting gun regulation. Members responded enthusiastically to the change, with enrollment increasing by 160,000 in 1968, the largest annual increase in its history. Over time, its friendly ties to the federal government eroded: the government greatly reduced its sale of surplus weapons to the NRA; the Department of Defense ordered a study into the efficacy of its famed marksmanship program; its tax-exempt status was challenged; and the government withdrew financial support for national shooting competitions.[510]

Following the assassination of President John F. Kennedy in 1963, the NRA was forced to respond to both internal and external pressures. Thrust to the forefront of a national tragedy and the rising political debate about gun control, leaders needed to defend their stance on gun rights in an environment increasingly hostile toward guns, as well as meet the demands of members who called for a more combative agenda to defend gun rights. Further, the NRA's public image as a wholesome sportsmen group had been tarnished. Once it was revealed that shooter Lee Harvey Oswald purchased the rifle used in the assassination from an advertisement in *American Rifleman*, the public soured on the NRA; as well, their role in forestalling gun

[509] Merritt A. Edson, "The Greatest Dangers," *American Rifleman* (June 1955): 16.
[510] Kennet and Anderson, *The Gun in America*, 242.

regulation was highlighted as part of their role as a "gun lobby."[511] The NRA responded that they were nothing of the kind, but committed to working with Congress to advance reasonable gun legislation:

> It is the position of the NRA that no gun commits a crime – the user is the culprit. Therefore, there should be laws which would punish severely the convicted offender on a mandatory basis if the crime involved the use of firearms. This principle places the burden on the offender, and does not affect the law-abiding citizen in the enjoyment of his freedom guaranteed under the Second Amendment of the Constitution.[512]

The NRA was adamant, following the assassination of President Kennedy, that reasonable gun regulation was essential to public safety, claiming that "only those citizens who have a definite need to carry concealed weapons should be licensed for this purpose." Further, "the words 'to keep and bear arms' do not mean that any person may carry concealed weapons at [their] pleasure or without the consent of the proper authorities."[513] Still, the NRA was criticized for promoting dangerous weapons and pressuring Congress as "gun lobby," a term that they knew would sully their public name. In response, the NRA focused on cultivating a positive public image that reflected their commitment to gun safety and training, the enforcement of reasonable gun laws, and efforts to keep guns out of the hands of criminals. The NRA continued to work with Congress toward reasonable regulation, urging moderation from its supporters who felt increasingly under attack. *American Rifleman* cautioned NRA loyalists:

> The time for hysteria and name-calling is over. It is time now to point out calmly and logically the areas in which legislation is proper and effective in discouraging the ownership and misuse of firearms by criminals and other undesirables. The lawmakers

[511] Gerald Posner, *Case Closed: Lee Harvey Oswald and the Assassination of JFK* (New York, NY: Random House, 1993), 102-103.
[512] The National Rifle Association Board of Directors, "Rifle Association Opposes Gun Registration, but Favors Control of Sales," *Cincinnati Enquirer* (Cincinnati, OH), 12 December 1963, 18.
[513] "Where Does the NRA Stand on Firearms Legislation?," *Portola Reporter* (Portola, CA), 30 January 1964, 2.

must be enlightened on the views of reputable citizens who believe in the Second Amendment.[514]

But many members were dissatisfied with this moderate position and urged the NRA to defend itself more aggressively against criticism and advance a more forceful defense of gun rights. The NRA responded by moving away from cooperation with lawmakers to become an active lobbying force that protested further gun control measures and emphasized a sweeping platform of gun rights. For example, following the passage of the Gun Control Act of 1968, *American Rifleman* opined that gun control was the result of a "richly-endowed propaganda machine" intent upon disarming law-abiding gun owners.[515] The NRA then intensified its political efforts, establishing a more aggressive watchdog board called the Legislative Action Unit that would inform affiliates to the "ever-growing threat of anti-gun and anti-hunter legislation" and encourage them to organize in protest.[516]

The Transformation of the NRA

The critical juncture for the NRA came in 1977 during their annual meeting, the "Cincinnati Revolt," which resulted in new leadership with a more militant agenda in pursuit of gun rights; as well, the NRA popularized a different interpretation of the Second Amendment that broke from its traditional understanding of the right of the states to arm their militias. Described as "one of the most far-reaching shake-ups in the 107 year history of the National Rifle Association," protesters rallied at the 1977 annual meeting to demand new leadership and to propose that activists from more radical gun groups take on the political fight for gun rights.[517]

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[514] "Realistic Firearms Controls," *American Rifleman* (January 1964): 14.
[515] "The Answer is Simply Law Enforcement," *American Rifleman* (November 1968): 16.
[516] "NRA to Step Up Legislative Action," *American Rifleman* (December 1973): 15.
[517] Reginald Stuart, "Rifle Group Ousts Most Leaders in Move to Bolster Stand on Guns," *New York Times* (New York, NY), 23 May 1977, 16.

This was the moment that the NRA fully transformed from a sporting association, "thoroughly mainstream and bipartisan, focusing on hunting, conservatism, and marksmanship," to "being a single-issue organization with a very simple take on that issue" – that issue being the protection of gun rights as essential to American freedom and "absolutist in their interpretation of the Second Amendment."[518]

Leading up to the meeting, NRA executive director Harlon Carter had been working behind the scenes with members to galvanize efforts to take the NRA in a more radical direction. Carter and his supporters invoked NRA parliamentary procedures to immediately amend the bylaws, then used them to usurp current leaders with more aggressive gun rights supporters.[519] The rebels listed fifteen demands, resulting in the removal of existing leadership and replacing them with activist leaders Harlon Carter and Neal Know, who were singular in their commitment to gun rights: "*No compromise. No gun legislation*."[520] Carter was elected president and vowed to fight against "any national gun law, no matter how innocent in appearance, no matter how simple it might be," which "presupposes a still further growth in a centralized, computerized, gun control bureaucracy in Washington, DC."[521] After this pivotal meeting, the NRA changed its political vision: what had once been a mission to provide "assistance to legislators in drafting laws discouraging the use of firearms for criminal purposes" and the "prevention of the passage of legislation unnecessarily restricting the use of firearms by honest citizens" now including a

[518] Joel Achenbach, Scott Higham, and Sari Horwitz, "How NRA's True Believers Converted a Marksmanship Group into a Mighty Gun Lobby," *Washington Post* (Washington, D.C.), 12 January 2013.
[519] Jim Carmichael, "The NRA Revolution," *Outdoor Life* (September 1977): 102-105.
[520] Achenbach, Higham, and Horwitz, "How NRA's True Believers Converted a Marksmanship Group into a Mighty Gun Lobby."
[521] Cited in "Guns: A Rare Look at the NRA," *60 Minutes* (18 September 1977).

sweeping promise that all law-abiding citizens were entitled to keep and bear arms – and the NRA would be the vanguard in protecting those rights. [522]

Achieving its Goals

Following this critical juncture, the NRA brought its newly radicalized platform of gun rights to the national stage, using a series of political tactics to achieve success. Historically, the National Rifle Association was – and continues to be – the most visible and well organized gun rights group, and widely representative of other organizations. The NRA was restructured to serve three specific functions in its pursuit of securing gun rights: a political advocacy group with wide membership; a charitable foundation to provide gun safety classes and distribute grants to gun clubs; and a political action committee to raise money to fund candidates. Other actors beyond the NRA also emerged, committed to creating a positive view of the gun in American public life. National gun rights groups, such as the Gun Owners of America and the National Association of Gun Rights, protested gun regulations and supported grassroots gun rights campaigns; further, many state gun associations shifted from sporting clubs to political advocacy groups with specific policy goals, such as open-carry initiatives. Other fringe "patriot" groups, while not always dedicated to guns as a single interest issue, included gun rights as part of a broader critique of federal overreach, some maintaining that armed insurrection was necessary to deter federal encroachment and to protect the Constitution.

As well, the NRA and other gun rights groups enjoyed close ties with the Republican Party, which resulted in increased visibility of and validity for the gun rights movement. The NRA's position coalesced with sweeping shifts within the Republican Party, aligning gun rights with widespread trends in the conservative movement. Republican Ronald Reagan was

[522] Cover Page, *American Rifleman* (March 1933): 1.

influential in this change: while running for California governor in 1966, Reagan defended gun rights, arguing that gun crime was the result of a flawed justice system and vowing to "resist any effort that would take from the American citizen his right to own and possess firearms."[523] Later, Reagan claimed that the Second Amendment was the nation's "great equalizer" in that it guaranteed a "small person with a gun" was "equal to a large person."[524] At the 1976 Republican National Convention, Republicans expanded their previous position on the right to bear arms (to "safeguard the right of responsible citizens to collect, own, and use firearms for legitimate purposes")[525] to a more forceful endorsement: "We support the right of citizens to keep and bear arms. We oppose federal regulation of firearms. Mandatory sentences for crimes committed with a lethal weapon are the only effective solution to this problem."[526] In response to rising political pressure, President Gerald Ford took a harder line against gun control, stating that "we ought to make it very clear [that] all right-thinking people who are law-abiding ought to have the traditional right under the Constitution to retain firearms for their own national protection, period."[527]

Finding allies in the federal government allowed the NRA to grow in both size and influence. Throughout the 1980s and particularly the 1990s, the NRA flourished as the vocal gun rights lobby so familiar to contemporary American politics, organizing campaigns to protest gun control legislation in Congress and playing an active role in presidential politics, a trend that began in the late 1970s and continues in current times. The NRA traditionally endorses

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[523] "Right to Bear Arms' Issues Flares Across the US," *Los Angeles Times* (Los Angeles, CA), 6 August 1966, 2.
[524] Ronald Reagan, "Ronald Reagan Champions Gun Ownership," *Guns and Ammo* (September 1975): 35.
[525] Republican National Convention, *Republican Party Platform* (Miami Beach, FL: Republican National Convention), 21 August 1972.
[526] Republican National Convention, *Republican Party Platform* (Kansas City, MO: Republican National Convention), 18 August 1976.
[527] James Deakin, "Ford Promises Crusade against Crime," *St. Louis Post-Dispatch* (St. Louis, MO), 27 September 1976, 4.

Republican presidential nominees and actively accuses Democratic opponents of attacking gun rights. For example, the NRA claimed in 2016 that nominee Hilary Clinton would "stop at nothing to eliminate the Second Amendment-protected freedoms of law-abiding citizens."[528] In the most recent election, they warned that "if Joe Biden wins, he will destroy our Second Amendment, and America will be unrecognizable"[529] In Congress, the NRA was, and still is, active in advocating pro-gun legislation, such as relaxing armed carriage licensing procedures and promoting right-to-carry initiatives. In general, the NRA argues that citizens should not be limited by Congress in their decision to carry a weapon and in what manner they chose to do so: "The choice of carrying a firearm for self-defense is a highly personal one, that it may literally be a matter of life and death, and that the means to self-defense must not be denied to any citizen except under the most extraordinary circumstances."[530] On this point, the NRA enjoyed a major political victory in 1987 when Florida adopted a "shall issue" licensing system similar to the NRA model (many states followed suit, with twenty-seven states now operating under shall-issue laws).[531] Further, the NRA was highly vocal in protesting the assault weapon ban in 1994; now part of the political establishment, well-funded and closely aligned with the New Right, the NRA could risk taking a hardline position as rhetoric against guns became increasingly militant.

The Political Efficacy of the Gun Rights Movement

The gun rights movement is strong, in part, because members are deeply committed to the cause and tend to be single issue voters, adding an intensity to their mission.[532] Political

[528] Chris W. Cox, "Election Day 2016: The Threat to Gun Rights and Our Way of Life," *American Rifleman* (November 2016): 18.
[529] https://thehill.com/homenews/campaign/514343-nra-biden-will-destroy-second-amendment-if-elected, 30 August 2020.
[530] David Conover, "To Keep and Bear Arms," *American Rifleman* (September 1985): 74.
[531] https://worldpopulationreview.com/state-rankings/concealed-carry-states.
[532] Pew Research Center for People and the Press, "After Newtown, Modest Change in Opinion About Gun Control," (2012).

scientist Matthew J. Lacombe argues that much of the NRA's success is the result of their ability to combine identity with politics: "The NRA cultivated a distinct worldview around guns – framing gun ownership as an *identity* that was tied to a broader, gun-centric political *ideology* – and mobilized its members into political action on behalf of its agenda."[533] As such, the gun rights movement has proven to be more politically motivated than proponents of gun control: a 2013 poll demonstrated gun rights advocates are twice as likely as gun control supporters to take concrete political action, such as donating funds, writing a letter to a public official, or signing a petition.[534] Further, there are both political and personal incentives to motivate members. The NRA, for example, functions as a civic organization for participants, providing a wide array of financial discounts and other benefits as well as publishing gun and hunting articles, holding shooting contests and other events that provide members with communal activities, and connecting members through the shared commitment to gun rights as a treasured American value linked to individualism and liberty.

The gun rights movement is powerful, as well, because leaders have positioned themselves strategically, approaching the government from multiple points to achieve their political objectives. Gun rights organizations are often grassroots groups coordinated across local, state, and federal levels, allowing multiple points of access to the government. The gun rights movement also interacts with the three branches of federal government; for example, professional lobbyists liaise with Congress and the executive branch on legislation while lawyers cultivate pro-gun cases in the courts. Another reason the gun rights movement has garnered success is that it has traditionally maintained a mutually beneficial relationship with the federal

[533] Matthew J. Lacombe, *Firepower* (Princeton, NJ: Princeton University Press, 2021), 4.
[534] Pew Research Center for People and the Press, "Broader Support for Renewed Background Check Bill, Skeptical about its Chances," (2013).

government. Historically, groups such as the NRA received generous government grants and access to surplus weapons, as well as privileges such as building shooting ranges on public land not subject to local zoning laws. Though close ties between gun rights groups and the government have weakened over time, the gun rights movement has maintained a unified political front with an intense focus on preventing the passage of restrictive gun laws. As well, they have a tactical advantage over gun control advocates, as it is easier to block legislation than to pass it: the threat of a tangible loss of rights can be more compelling than potential gains.[535]

As a highly organized and motivated force, the NRA has continued to work at the federal level to negotiate gun legislation to its favor, even in the face of high profile gun tragedies. For example, following the Virginia Tech tragedy in 2007, the NRA cooperated with Congress to pass legislation to assist states in tracking those prohibited from purchasing firearms by improving the national background check system; the NRA was successful in achieving concessions that made it less onerous to law-abiding gun owners.[536] By supporting legislative efforts to curb gun violence, groups such as the NRA not only achieve their policy objectives (for example, assuring that less restrictive legislation is passed or retaining political bargaining power), but also cultivate a more positive public image as Americans become increasingly hostile to guns.[537] A key political objective of the gun rights movement is to prevent restrictive legislation from moving forward, such as reinstating the federal ban on assault rifles and background checks for private gun sales, a goal that has largely been achieved. At the state

[535] Howard Schuman and Stanley Presser, "The Attitude-Action Connection and the Issue of Gun Control," *The Annals of the American Academy of Political and Social Science* 455 (1981): 40-47. For more on the NRA's political tactics, see Kelly Lorelei, "How Groups Like the NRA Captured Congress – and How to Take it Back," *The Atlantic* (7 March 2013).
[536] Jacqueline Palank and Ian Urbina, "House Votes to Bolster Database on Gun Buyers," *New York Times* (New York, NY), 14 June 2007, 20.
[537] Josh Bresnahan, "NRA Moves to Head Off Gun Control Fight in Congress," *Politico*, 5 October 2017.

level, gun rights groups have enjoyed similar victories. Their focus has been similar to measures at the federal level: they have worked to secure preemption laws that limit local authorities from regulating firearms; they have enacted state laws similar to federal legislation that exempt certain gun manufacturers and merchants from lawsuits; they have curtailed local authorities from determining who may carry a concealed weapon; and they have proposed laws that would allow concealed weapons licenses to be reciprocal across state lines.[538] In sum, though its influence has waned in recent years, the gun rights movement remains one of the most powerful forces in American politics.

The Politics of Gun Rights and the Second Amendment

In spite of its political successes, until 2008, an overarching goal of the gun rights movement – to provide a legal justification for the individual right to keep and bear arms – had yet to be achieved. One of the NRA's most striking projects would be to wholly transform the way American citizens understood the Second Amendment through a concentrated campaign of articles and books that argued for an individualist interpretation of the Second Amendment, a theoretical argument that would soon gain momentum as a convincing political strategy to safeguard gun rights. Traditionally, the NRA and its supporters understood the right to bear arms as both a right and a responsibility: the lawful purchase and keeping of weapons should not be denied to "citizens of good repute, so long as they continue to use such weapons for lawful purposes."[539] This notion of the right to bear arms was both a defense of widespread gun ownership, but also a commitment to reasonable gun regulation.

[538] Kelly D. Patterson and Matthew M. Singer, "Targeting Success: The Enduring Power of the NRA," in *Interest Group Politics*, eds., Allan J. Ciglar and Burdett A. Loomis (Washington, D.C.: CQ Press, 2006), 37-64.
[539] Louis F. Lucas, "The National Rifle Association of America," *American Rifleman* (May 1959): 16.

With the radicalization of the NRA in the late 1970s, however, the NRA endorsed an individualist reading of the Second Amendment that rested on the natural right of self-defense to advance a more aggressive political agenda. This was not a new position for the NRA, but it was now popularized to defend gun rights against restrictive legislation and gradually adopted by the Republican Party. Historically, the NRA claimed that the Second Amendment was not a collective right, but guaranteed "the right of all reputable citizens to own and bear arms, as guaranteed to them by the Constitution."[540] According to this interpretation, the right to bear arms was integral to protecting American's natural right to liberty:

> One of the fundamental[s] of American citizenship is the inalienable right to be secure in life, liberty, and the pursuit of happiness. Another fundamental is the right to keep and bear arms. Both became part of the fabric of our nation while the United States of America came into being. The twain go hand in hand; the one is the means of assuring the other. Make it impossible for the American citizen to keep and bear arms, and his life, liberty and happiness are placed at the mercy of the lawless.[541]

Further, "it was obviously the intent of the statesmen who drew up this amendment to commit the Federal Government to a hands-off policy with regard to the ownership and possession of arms by the individual."[542] Despite a long-standing understanding of the Second Amendment – in both the legislatures and the courts – as a right of the states to arm their militias, the NRA argued that the Second Amendment was founded on the "truism that the right of law-abiding citizens to keep and bear arms in a democracy is a necessary corollary to the retention of their rights and liberties as freemen."[543] For the NRA, debating the meaning of Second Amendment only complicated what should be a basic constitutional question:

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[540] "The Foreign Gunman in American Crime," *American Rifleman* (September 1925): 22.
[541] "Another View of Preparedness," *American Rifleman* (July 1923): 10.
[542] Raymond R. Camp, "Wood, Field, and Stream," *New York Times* (New York, NY), 11 February 1941, 31.
[543] "As Allowed by Law," *American Rifleman* (November 1953): 16.

> There has been so much conflicting "expert" opinion, so many interpretations of constitutional law, that it is hardly surprising that widespread confusion exists in the minds of sincerely interested persons…we prefer to believe that the simple, straightforward language means exactly what it says.[544]

In other words, the Second Amendment guaranteed a sweeping individual right to keep and bear arms, a right which the NRA was committed to protecting. While this position had been fundamental to the NRA's vision, historically it had remained largely separate from its political agenda. [545] Now, however, the NRA had to perform a political balancing act that advocated a robust individual right to bear arms but still respected public safety and existing gun laws, including measures to regulate concealed weapons, weapons used outside of common practices of defense, and the problem of guns in densely populated areas. Further, within the ranks, there was increased disagreement about the scope of federal regulation and what was legally permissible if, indeed, the Second Amendment protected a sweeping individual right to keep and bear arms.

A New Second Amendment?

At the same time the NRA was gaining political influence, Congress indicated that its traditional understanding of the Second Amendment as a collective right was beginning to change. In 1982, the Subcommittee on the Constitution of the Senate Judiciary Committee

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[544] Merritt A. Edson, "The Right to Bear Arms," *American Rifleman* (July 1955): 14.

[545] The NRA became interested in the origins and meaning of the right to bear arms in the 1950s. To learn more about the heritage of the Second Amendment, the NRA commissioned member Jack Basil, Jr. in 1955 to conduct an inquiry into the history and precedents of the Second Amendment. Ironically, Basil's findings did not support an individualist reading, but confirmed the prevailing interpretation of the Second Amendment as a collective right: "From all the direct and indirect evidence, the Second Amendment appears to apply to a collective, not an individual, right to bear arms. So have the courts, Federal and State, held. Further, the courts have generally upheld various regulatory statutes of the State to be within the proper province of their police power to protect and promote the health, welfare, and morals of their inhabitants." Unsurprisingly, the NRA did not publish Basil's findings and instead held firm to their individualist interpretation. (Letter from Jack Basil, Jr. to Merritt A. Edson, 18 June 1955, cited in Patrick J. Charles, *Armed in America* (Amherst, NY: Prometheus Books, 2018), 227.)

issued a report that asserted the Second Amendment guaranteed an individual right to keep and bear arms.[546] In 1986, Congress passed the Firearms Owners Protection Act, which articulated the rights of gunowners – entitled to keep and bear arms under the Second Amendment – who had been unduly restricted under previous legislation. Further, the Act protected against the unreasonable search and seizures of weapons under the Fourth Amendment; assured due process under the Fifth Amendment; and against unconstitutional exercise of authority under the Ninth and Tenth Amendments. Finally, one of the Act's most striking provisions permitted citizens to travel across state lines with firearms, even if those weapons were illegal in the visiting state. The Gun Control Act of 1968 was amended to allow for the interstate transportation of firearms: any citizen who was authorized to own a firearm "shall be entitled to transport an unloaded, not readily accessible firearm in interstate commerce notwithstanding any provision of any legislation enacted, or any rule or regulation prescribed by any State or political subdivision thereof."[547] Overall, the Act was intended "to correct existing firearms statutes and enforcement policies" and to "reaffirm the intent" of the Gun Control Act of 1968:

> It is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.[548]

The implications of the Firearms Owners Protection Act extended beyond the rights of gun owners to impact the federal administration of gun policy. Traditionally, gun rights activists accepted that the individualist interpretation of the Second Amendment granted a sweeping right

[546] United States Senate, Subcommittee on the Constitution of the Senate Judiciary Committee, "The Right to Keep and Bear Arms," February 1982.
[547] The Firearms Owners Protection Act (1986), section 926A.
[548] Ibid., section 101.

to keep and bear arms for personal self-defense – but this right would be regulated by the states. Even if the Supreme Court overturned precedent to legally establish the individual right to keep and bear arms, gun rights activists should not "conclude that suddenly Utopia has arrived for the gun owner" because such a right would still be regulated under state police powers: the Second Amendment applied only the federal government, not the states.[549] Washington Superior Court judge and NRA president Bartlett Rummel explained that the federal government was limited in its capacity to legislate firearms based on its authority to tax and regulate the federal mail system. However, state police power, or "the right to regulate the conduct of persons in furtherance of the health, safety, and the general welfare of the citizens," meant that the states could impose reasonable gun regulation, such as "concealed weapons, the possession of weapons not ordinarily used for defense or welfare, the firing of guns in populous areas, and many other like regulations."[550] With new federal legislation that allowed the interstate transport of weapons, however, it was ambiguous what role the states would play in regulating firearms; further, it was unclear if the Second Amendment still protected the states from federal encroachment, as it was historically understood to do.

Even with these questions unsettled, however, the gun rights movement remained committed to protecting the individual right to keep and bear arms. Scholar Osha Gray Davidson described the connection between gun rights and the Second Amendment as fundamental to the movement's creed. According to Davidson:

> It's impossible to overstate the hold these words have on the gun group. NRA members consider the Second Amendment the most important of the original ten amendments. It is, they contend, the queen of the Bill of Rights, the linchpin of democracy, the one loose thread in the protective cloak of the Constitution: Pull it out and the rest of the Bill of

[549] Bartlett Rummel, "To Have and Bear Arms," *American Rifleman* (June 1964): 41.
[550] Ibid.

> Rights unravels. That's because – to the NRA's way of thinking – only an armed citizenry can prevent a tyrannical government from abolishing the rest of our freedoms.[551]

"These words" so sacred to the NRA, however, are not the complete text of the Second Amendment. Davidson notes that the NRA headquarters in Washington, D.C. displays a truncated version of the amendment: the sign reads, "The right of the people to keep and bear arms shall not be infringed." Notably absent is the prefatory clause referring to a well-regulated militia. Not only does this version of the Second Amendment dismiss the traditional notion of the Second Amendment as a collective right, it also essentially removes the states from playing a role in gun regulation by expunging the militia clause. To provide legitimacy to its political position, then, the gun rights movement would have to make a convincing constitutional argument for the individual right to keep and bear arms; further, they would have to account for the prefatory clause regarding a well-regulated militia and what role the states would play in regulating firearms. This endeavor would result in a fundamental change in interpreting the Second Amendment, and raise questions about how this interpretative shift would impact the increasingly contentious debate about gun rights in American politics.

[551] Osha Gray Davidson, *Under Fire* (Iowa City, IA: University of Iowa Press, 1998), 134.

Chapter Nine:

Making the Case for Gun Rights

The gun rights movement is a relatively new phenomenon in American politics, but its impact as a special interest group cannot be overstated. As a highly motivated and effective affiliation of local, state, and federal organizations committed to a positive view of firearms, the gun rights movement focuses on securing the political interests of gun owners by challenging restrictive gun legislation, as well as advancing an individualist interpretation of the right to keep and bear arms to justify their mission. Members of the gun rights movement include a wide array of actors: activist and lobby groups to organize citizens and politicians to advocate the cause of gun rights (such as the Virginia Citizens Defense League); think tanks and policy research institutes to articulate the political goals of the gun rights movement (such as the Independence Institute and the Second Amendment Foundation); political action committees tasked with raising money to finance candidates for public service (such as the National Rifle Association Political Victory Fund and the Gun Owners of America Political Victory Fund); gun clubs and shooting associations that promote best practices in gun use; and gun manufacturers, retailers, and distributors that protect the economic interests of gun owners. Finally, the gun rights movement includes lone wolf activists who either protest restrictive gun laws independently or organize into small groups, often including law enforcement officials. The political motivations and interests of the various members of the gun rights movement may vary, but share a common commitment to protecting the rights of law-abiding gun owners and advancing a robust platform of gun rights.

The gun rights movement relies on the argument that – in contrast to decades of political, scholarly, and legal consensus that understood the Second Amendment to guarantee the states the

right to arm their militias – the Second Amendment, in fact, protects an individual right to keep and bear arms. For supporters of the individualist interpretation, the Second Amendment should be "restored" to its proper place, as the academy has largely overlooked the true meaning of the right to keep and bear arms, and the courts must address this oversight by correcting earlier jurisprudence. The main tenets of the individualist interpretation rely on several common themes, including the claim that the Second Amendment protects the individual right to bear arms for private purposes, independent of militia service; that the people must be guaranteed the right to self-defense; and, most relevant to the politics of gun control, that the benefits of widespread gun ownership outweigh the costs. For these arguments to be convincing, however, they needed to be sanctioned by the courts, an objective that the gun rights movement began to pursue aggressively beginning in the 1960s.

As a result, a vast body of literature emerged advancing the individualist interpretation of the Second Amendment, much of which was funded by the National Rifle Association and other gun rights groups. This scholarship was not merely constitutional analysis, but included a distinct agenda to promote the cause of gun rights, which would eventually influence – and polarize – the broader political and legal debates about the parameters of the right to keep and bear arms. The goal of these historians and lawyers was to argue the individual rights model so convincingly that former interpretations would seem antiquated and severely limited in scope. Doing so would allow them to justify the historical provenance of the Second Amendment, as well as encourage the courts to correct their former position to advance a more forceful defense of the individual right to keep and bear arms for personal use outside of militia service – and to use this legal authority to promote the cause of gun rights in American politics. The gun rights movement was largely successful in achieving these objectives, but that victory did not settle the

problem, leaving open the question of how the issue of gun rights should be debated and resolved in American politics.

The Individual Rights Interpretation of the Second Amendment

The scholarship articulating the individualist interpretation of the Second Amendment is vast. This overview is intended to highlight the most representative arguments and common historical rationales of a very large body of literature, as well as to situate the academic framework within the broader issue of the politics of gun control. Prior to the 1960s, the gun rights movement had alluded to its understanding of the Second Amendment as a protection of the individual right to keep and bear arms, but had not fully incorporated constitutional doctrine into its political strategy. Up to this point, gun rights activists had achieved their objectives through grassroots campaigns to affect political outcomes rather than make a convincing legal case for the individual rights interpretation of the Second Amendment. It became clear, however, that the Second Amendment could be utilized as a powerful political tool to advance the cause of gun rights, reinterpreted to justify the individual right to keep and bear arms.

From 1900 to 1960, there were only twelve articles pertaining to the Second Amendment published in law journals, all of which interpreted the Second Amendment as a collective right.[552] Traditionally, the Second Amendment was understood as the right of the states to arm

[552] See "The Constitutional Right to Keep and Bear Arms and Statutes Against Carrying Weapons," *American Law Review* 46 (1912): 777-779; "Right to Bear Arms," *Law Notes* 16 (1913): 207-208; "Second Amendment," *St. John's Law Review* 14 (1939): 167-169; V. Breen et al., "Federal Revenue as Limitation on State Police Power and the Right to Bear Arms – Purpose of Legislation as Affecting its Validity," *Journal of the Bar Association of Kentucky* 9 (1940): 178-182; John Brabner-Smith, "Firearm Regulation," *Law and Contemporary Problems* 1 (1934): 400-414; Lucilius A. Emery, "The Constitutional Right to Keep and Bear Arms," *Harvard Law Review* 28 (1915): 473-477; George I. Haight, "The Right to Keep and Bear Arms," *Bill of Rights Review* 2 (1941): 31-42; F.J.K., "Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation," *University of Pennsylvania Law Review* 98 (1950): 905-919; D.J. McKenna, "The Right to Keep and Bear Arms," *Marquette Law Review* 12 (1928): 138-149; W. Montague, "Second Amendment, National Firearms Act," *Southern California Law Review* 13 (1939): 129-130; Ralph J. Rohner, "The Right to Bear Arms: A Phenomenon of Constitutional History," *Catholic University Law Review* 16 (1996): 53-84; and F. B. Weiner, "The Militia Clause of the Constitution," *Harvard Law Review* 54 (1940): 181-220.

their militias for the common defense, codified in historical scholarship and the courts; while the notion of an individual right to keep and bear arms was not an unfamiliar legal concept, it was not constitutionally protected by the Second Amendment. Despite the lack of historical justification, the NRA and other gun rights groups maintained that the individual right to keep and bear arms was the foundation of the Second Amendment: "The founding fathers of the United States adopted the Second Amendment of the Constitution" because the armed individual was necessary "to assure the existence of a large force of armed citizens capable of springing to the defense of the nation on short notice."[553] Beginning in the 1960s, however, scholars and historians (many of whom were affiliated with or funded by gun rights groups) launched a comprehensive campaign to revisit the origins of the Second Amendment to make a definitive legal case for the individualist interpretation, hoping this rationale would encourage the courts to change their historical understanding of the right to keep and bear arms and provide the gun rights movement the constitutional legitimacy to justify its cause.[554]

The first law review article advancing the individualist interpretation was published by Stuart R. Hays in 1960. Hays made two novel arguments that challenged the prevailing interpretation of the Second Amendment: first, the Second Amendment protected an individual right to keep and bear arms for self-defense independent of military service; and second, the Second Amendment protected a "right to revolution." Hays wrote:

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[553] National Rifle Association, cited in James E. Serven, ed., *Americans and Their Guns* (Harrisburg, PA: Stockpole Press, 1967), 14.

[554] For examples of articles funded by the National Rifle Association and the National Shooting Sports Foundation, see David I. Caplan, "The Right of the Individual to Bear Arms: A Recent Judicial Trend," *Detroit College of Law Review* 4 (1982); Robert Dowlut and J. A. Knoop, "State Constitutions and the Right to Keep and Bear Arms," *Oklahoma City University Law Review* 7 (1982): 177-241; Richard E. Gardiner, "The Preserve Liberty – A Look at the Right to Keep and Bear Arms," *Northern Kentucky Law Review* 10 (1982): 63-96; Stephen P. Halbrook, "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791," *Northern Kentucky Law Review* 10 (1982): 13-39; and David T. Hardy and John Stompoly, "Of Arms and the Law," *Chicago-Kent Law Review* 51 (1974): 491-524.

> Historically, society has recognized that man has the right to preserve his own species. This is the right to repeal invasion and to resist enemy activity. Secondly, society has recognized the right of man to protect himself against his internal enemies and to preserve his own life through the right of *personal* self-defense.[555]

Further, "society has recognized the right of man to revolt against the oppression of his political leaders."[556] Hays based these claims on the British notion of arms-bearing that included "the right of revolution; the right of group self-preservation; and, the right of self-defense. Without these rights there would be no reason for the bearing of arms."[557] Hays argued that the American colonists, having inherited these British traditions, understood their right to bear arms as a personal defense against tyranny: "Nearly every man was an army unto himself, equipped with rifle and powder. The retaining of arms was encouraged by the mother country."[558]

Hays's first argument – that the Second Amendment established the individual right to bear arms for self-defense independent of militia service – rested on the claim that because the Second Amendment referred to both the militia and the people, it guaranteed the right of all individuals to keep and bear arms.[559] Second, the Second Amendment protected the right to revolution; the people were entitled to rebel against a tyrannical government in armed revolt: "It is with the defensive and revolutionary forces that the Second Amendment concerns itself. As part of the great power of the revolutionary force, weapons are an element of the control of men's

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[555] Stuart R. Hays, "The Rights to Bear Arms: A Study in Judicial Misinterpretation," *William and Mary Law Review* 381 (1960): 405.
[556] Ibid.
[557] Ibid., 388.
[558] Ibid., 405.
[559] Hays explains his rationale: "The term militia means an army of citizens; it is a collective term referring to a group of persons acting under authority as the army of the people. Why then does the Second Amendment refer to both the 'militia' and the 'people' if not for the very purpose of protecting the rights of both groups? Militia connotes a group, while people refers to all the group. It is very possible for a person in the militia to be of the people, in fact all persons in the militia are of the people group, but not all of the people are in the militia." Ibid., 406.

destiny. In the operation of government they are a safeguard against tyranny."[560] These two arguments would serve as the foundation for the proliferation of law review articles that soon followed, many of which were commissioned by the NRA and other gun rights groups.

The NRA had long held an individualist interpretation of the right to bear arms, but it was not until legal scholar Robert A. Sprecher's article "The Lost Amendment" was published by the American Bar Association in 1965 that there was historical justification for their position. Sprecher's article was the first to examine the historical background of the Second Amendment to establish its legal meaning, arguing that "the parallel history of the militia and the right (or duty) to bear arms…does not warrant concluding that it necessarily follows from the pairing of the concepts that a person has a right to bear arms solely in his function as a member of the militia."[561] Sprecher acknowledged the fear of standing armies and the importance of well-regulated state militias at the Founding, but argued that the Second Amendment was no longer limited to militia service. Rather, history supported an individualist interpretation based on the notion of armed self-defense, "a right which tends to insure, protect and guarantee the other and fundamental rights to life, liberty and property," a position that would restore the Second Amendment to its correct meaning.[562] The courts must overturn existing jurisprudence that limited the right to keep and bear arms; "it would not be difficult for the Court, in view of the kinds of arms that now exist, to convert the Second Amendment into an *absolute* right to bear arms, unhampered by any concept of arms for militia use only."[563] Sprecher made further normative recommendations to the courts: the courts should acknowledge that armed self-

[560] Hays, "The Rights to Bear Arms: A Study in Judicial Misinterpretation," 381.
[561] Robert A. Sprecher, "The Lost Amendment," *American Bar Association Journal* 51 (June 1965): 557.
[562] Ibid., 668.
[563] Ibid., 666.

defense can contribute to "some sound public purpose" when armed citizens defend themselves against crime; individuals would be able to "protect against the ravages and depredations of organized crime through the Second Amendment;" and the courts should "find the lost Second Amendment, broaden its scope and determine that it affords the right to arm a state militia and also the right of the individual to keep and bear arms."[564] For Sprecher, the true meaning of the Second Amendment had been lost of over time, and it was the duty of the courts to establish the constitutional primacy of the individual right to bear arms.

The New Standard Model

Sprecher's argument inspired many similar articles and books that would form the basis of a scholarly movement set to change the prevailing interpretation of the Second Amendment from a collective right to an individual right, with the political goal of protecting the rights of law-abiding gun owners as the debate about gun control intensified.[565] This literature provided a blueprint that would be used in a proliferation of subsequent law review articles, establishing what likeminded scholars described as the "New Standard Model" of Second Amendment scholarship: "Indeed, there is sufficient consensus on many issues that one can properly speak of

[564] Sprecher, "The Lost Amendment," 666-669.

[565] There is a plethora of law review articles advancing the individualist interpretation of the Second Amendment. Some of the most noteworthy include: Akhil Reed Amar, "The Bill of Rights as a Constitution," *Yale Law Journal* 100 (1991): 1131-1210; Randy E. Barnett and Don B. Kates, "Under Fire: The New Consensus on the Second Amendment," *Emory Law Review* 45 (1996): 1139-1259; Stephen P. Halbrook, "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791," *Northern Kentucky Law Review* 13 (1983): 14-30; David T. Hardy, "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment," *Harvard Journal of Law and Public Policy* 9 (1986): 559-638; Don B. Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (1983): 204-273; Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 637-660; Nelson Lund, "The Second Amendment, Political Liberty, and the Right to Self-Preservation," *Alabama Law Review* 39 (1987): 103-130; Joyce Lee Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," *Hastings Constitutional Law Quarterly* 10 (1983): 285-314; Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment," *Tennessee Law Review* 62 (1995): 461-512; Robert E. Shalhope, "The Ideological Origins of the Second Amendment," *Journal of American History* 69 (1982): 599-614; Eugene Volokh, "The Amazing Vanishing Second Amendment," *New York University Law Review* 73 (1998): 831-840; and David C. Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment," *Yale Law Journal* 101 (1991): 551-616.

a 'Standard Model' in Second Amendment theory, much as physicists and cosmologists speak of a 'Standard Model' in terms of the creation and evolution of the Universe…the overall framework of analysis, the questions regarded as being clearly resolved, and those regarded as still open, are all generally agreed upon."[566] The term was not ubiquitous, however: many scholars refused to use the term "New Standard Model," taking issue with the implied dominance of the individualist interpretation. Political scientist Robert J. Spitzer, who has written extensively about the right to bear arms and gun control, claimed in 2000: "I decline to use the term 'standard modelers' or 'standard model' to refer to those who advocate alternate views of the Second Amendment, as this term implies something standard, orthodox, or historically mainstream about this point of view, which, in my view, is not the case."[567]

The individualist interpretation of the Second Amendment rested on four main pillars, reiterated in much of the New Standard Model literature. First, the Second Amendment guaranteed a sweeping individual right to keep and bear arms for personal reasons; second, this right was not contingent upon a well-regulated militia or any commitment to organized military service; next, it guaranteed the right of citizens to arm themselves in self-defense and protect themselves from harm; finally, the benefits of widespread arms-ownership trumped the costs of gun violence. Many of these scholars, as well, argued that the Second Amendment had been largely overlooked by the academy and, when it had been considered, its proper meaning was misinterpreted. According to Robert A. Sprecher, "Except for the Third Amendment…no amendment has received less judicial attention than the second," problematic because "the

[566] Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment," *Tennessee Law Review* 62 (1995): 463.
[567] Robert J. Spitzer, "Lost and Found: Researching the Second Amendment," *Chicago-Kent Law Review* 76 (2000-2001): footnote 15, 352.

Second Amendment is not at all clear in its meaning and reasonable minds have differed widely as to the desirability of any assigned interpretation."[568]

Common Sources

To justify their position, many individual rights scholars relied on a shared core of historical sources, including early constitutional documents and state court gun cases. The English Declaration of Rights, for example, was often cited to justify the right to armed resistance: as discussed in Chapter One, the Declaration of Rights protected Protestants from being disarmed and guaranteed their right to serve in the militia.[569] This document enshrined the notion of arms ownership for personal self-defense as well as the protection of a universal militia, leading individual rights scholars to conclude that early colonists had "a dual legal background, both components of which linked individual arms ownership with freedom." The British legacy meant that Americans "stressed the right to have arms, as a means of individual self-defense [and] the duty to have arms, as a means of collective self-defense."[570]

Anti-Federalist Patrick Henry's speeches during the Virginia constitutional convention debates provided another source of material to defend the individual right to keep and bear arms, often referenced by legal historians as providing a rallying cry for the individual right to bear arms. For example, lawyer Stephen P. Halbrook quotes Henry's speech – "The great object is, that every man be armed…every one who is able may have a gun," – to conclude that Henry and other Anti-Federalists intended the Second Amendment to protect a sweeping individual right to keep and bear arms. Further, "each and every recommendation [from the Anti-Federalists] that

[568] Sprecher, "The Lost Amendment," 554.
[569] "The subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law." See the English Declaration of Rights, 1689, article VII.
[570] David T. Hardy, "The Rise and Demise of the 'Collective Right' Interpretation of the Second Amendment," *Cleveland State Law Review* 59 (2011): 321.

mentioned the right to keep and bear arms clearly intended an individual right."[571] (Henry's full quote is worth revisiting, however. Henry was concerned not merely with guns, but with securing the states' ability to arm their militias and how power would be shared between the states and the federal government. Referring to the states, Henry asked:

> May we not discipline and arm them, as well as Congress, if the power be concurrent? So our militia shall have two sets of arms, double sets of regimentals, etc.; and thus, at a very great cost, we shall be double armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms, etc.? Every one who is able may have a gun.[572]

Henry later argued that while it is necessary to arm the militia, the states had not always been able to do so, thus the Second Amendment was necessary to secure this right.)

The Pennsylvania Minority Report was another frequently cited historical source to support the individualist interpretation, a document that advanced a more sweeping right to bear arms to include arms for self-defense, sporting, and military service:

> That the people have a right to bear arms for the purpose of defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not be kept up; and that the military shall be kept under strict subordination to and governed by the civil power.[573]

As discussed in Chapter Four, this proposal failed to pass and was not widely debated, indicating that the framers of the Second Amendment did not agree with the Pennsylvania minority that the right to self-defense or to hunt should be included in the Bill of Rights. (Even if this had been

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[571] Stephen P. Halbrook, *That Every Man be Armed* (Albuquerque, NM: University of New Mexico Press, 2013), 80-81.
[572] Patrick Henry, "Speech at Virginia Ratification Debate" in Jonathan Elliot, ed., *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, volume III (Philadelphia, PA: J.P. Lippincott, 1941), 386.
[573] Robert Whitehall, "Speech, Pennsylvania Convention," in John P. Kaminski, ed., *Documentary History of the Ratification of the Constitution*, volume II (Madison, WI: Wisconsin Historical Society Press, 1976), 597-598.

the case, the Minority Report also recommended regulation connected to "crimes committed" and "danger of public injury from individuals.") Still, this did not prevent legal scholars from using the Minority Report to justify the individualist interpretation of the Second Amendment, arguing that the Founders "enjoyed an almost unlimited right to keep and bear arms" and that there was "virtually no historical evidence" to suggest limits on this right.[574]

Finally, another source of evidence used to advance the individualist interpretation relied on nineteenth century state gun cases, including *Bliss v. Commonwealth* (1822), *Aymette v. State* (1840), and *Nunn v. State* (1846), discussed in Chapter Five. These cases were among the handful of decisions that overturned state gun laws and declared a robust right to keep and bear arms; for example, *Bliss* stated that "the right of the citizens to bear arms in defence of themselves, and the State, shall not be questioned." (While many of these cases articulated a broader notion of the right to keep and bear arms than what was established in the Bill of Rights, they still remained focused on the militia: "All this for the important end to be attained: the rearing up and qualifying [of] a well-regulated militia, so vitally necessary to the security of a free State.")[575] Further, scholars argued that such cases articulated a different definition of "the people." Rather than the traditional legal view that understood "the people" as a collective body of citizens regulated by the states, these cases were used to proffer an alternative definition of "the people" to refer to all citizens who were guaranteed the individual right to keep and bear arms under the Second Amendment (similar to other sections of the Bill of Rights), leaving scholars to conclude that those "courts concerned about the need for guidance in applying the Second Amendment can seek it…in the state court tradition interpreting the right to bear

[574] Nelson Lund, "No Conservative Consensus Yet: Douglas Ginsburg, Brett Kavanaugh, and Diane Sykes on the Second Amendment," *Engage* 13 (2012): 30.
[575] *Nunn v. State* (1846).

arms…these are decisions that (1) recognize the individual right to bear arms and (2) treat self-defense as a central purpose of to that right."[576]

Variations on a Theme

Based on these common historical sources, many individualist scholars approached the question of interpreting the right to keep and bear arms from a similar premise: the Second Amendment had *always* guaranteed an individual right to keep and bear arms, but it had either been overlooked or misinterpreted in political commentary and legal scholarship; further, advancing a different interpretation would restore the Second Amendment of its constitutional integrity. For example, in an influential article published in 1989, "The Embarrassing Second Amendment," legal scholar Sanford Levinson articulated many of the main tenets that formed the basis of the individual rights model and would be utilized repeatedly by other writers. Levinson argued that the Second Amendment had been overlooked by lawyers and political scientists; further, the handful of Second Amendment cases that had come before the courts were irrelevant to modern interpretations because they were decided prior to the incorporation of the Bill of Rights. The Second Amendment should be understood to protect a sweeping individual right to keep and bear arms; further, citizens may take the law into their own hands if their government was tyrannical or failed to protect them from threat. For Levinson, the wording of the amendment was vague: a "militia" included both individual and collective rights, but leaned more toward an individualist interpretation when read in conjunction with the rest of the Bill of Rights.[577] (The Second Amendment was "embarrassing" because it presented a tension for those who supported gun control while adhering to a strict commitment to the Bill of Rights. Silence

[576] Michael P. O'Shea, "Modeling the Second Amendment Right to Carry Arms: Judicial Tradition and the Scope of 'Bearing Arms' for Self-Defense," *American University Law Review* 61 (2012): 676.
[577] Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 637-660.

from the academy was the result of "a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even 'winning,' interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation."[578] For too long, the Second Amendment was treated "as the equivalent of an embarrassing relative," but now should "enter full scale into the consciousness of the legal academy" to result in a more balanced discussion of gun control).[579] Levinson's article articulated many of the main principles of the individual rights model, establishing a framework for other scholars to expand the argument to include different historical justifications, including the British origins to the right to keep and bear arms, originalism, the right to bear arms under the Fourteenth Amendment, and the right to revolution.[580]

The British Origins of Arms-Bearing

Historian Joyce Lee Malcolm, for example, revisited the British antecedents of the right to keep and bear arms to develop a different interpretation of the Second Amendment. Traditionally, historians had argued that Article VII of the British Declaration of Rights established a parliamentary right to control the militia as an alternative to a standing army.[581] Malcolm, however, read Article VII differently, claiming that it was not focused on the militia, but justified the right of British citizens to bear arms in self-defense; while arms-bearing in the militia was part of one's civic duty, it was distinct from bearing arms for protection and self-defense (protected by common law). Malcolm noted that beyond militia duty, which was "summoned only occasionally," British subjects were required to protect themselves and others

[578] Levinson, "The Embarrassing Second Amendment," 642.
[579] Ibid., 658.
[580] There is much overlap among these four approaches; many scholars focus on more than one theme to defend their position, or, in some cases, all four. See, for example, David T. Hardy, "The Rise and Demise of the 'Collective Right' Interpretation of the Second Amendment," *Cleveland State Law Review* 59 (2011): 315-360.
[581] Lois G. Schwoerer, *The Declaration of Rights, 1689* (Baltimore, MD: Johns Hopkins University Press, 1981), 78.

from harm: "The old common law custom persisted that when a crime occurred citizens were to raise a 'hue and cry' to alert their neighbors, and were expected to pursue the criminals."[582] When the right to bear arms was curtailed under King Charles II and King James II, leading to the adoption of the English Bill of Rights, the right to keep and bear arms "was a very real and an individual right," albeit one that was often expressed collectively through military service.[583] For Malcolm, however, "the twin concepts of a people armed and a people trained to arms were linked, but not inseparably."[584] American colonists inherited these traditions, leading Malcom to conclude that "the Second Amendment should be properly read to extend to every citizen the right to have arms for personal defense. This right was the legacy of the English, whose right to have arms was, at base, as much a personal right as a collective duty."[585]

Originalism

Another common argument used to justify the individualist interpretation was originalism, which included discussion of the Framers' original intent in crafting the Second Amendment, the historical understanding of the state militia system, and how these bygone facts should be applied to the politics of modern gun ownership. Scholars revisited the meaning of each phrase of the Second Amendment, seeking to determine the differences between the right to keep arms and the right to bear arms, the parameters of those rights under a well-regulated militia, and who constituted "the people." For example, historian Robert E. Shalhope argued that

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[582] Joyce Lee Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," *Hastings Constitutional Law Quarterly* 10 (1983): 291.
[583] Ibid., 313.
[584] Ibid., 314.
[585] Ibid. See also Joyce Lee Malcolm, *Disarmed: The Loss of the Right to Bear Arms in Restoration England* (Washington, DC: NRA Institute for Legislative Action, 1981); and Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, MA: Harvard University Press, 1994). For legal scholars who made similar arguments, see Robert J. Cottrol and Raymond T. Diamond, "The Fifth Auxiliary Right," *Yale Law Journal* 104 (1995): 995-1026; and David B. Kopel, "This Isn't About Duck Hunting: The British Origins of the Right to Arms," *Michigan Law Review* 93 (1995): 1333-1362.

while the Framers preferred a well-regulated militia to a professional standing army, the right to bear arms was not limited to militia activity but included the right to self-defense. Referring to the Founders, Shalhope argued that "these men firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society."[586] Based on historical evidence from the Founding and subsequent commentary on the Bill of Rights, Shalhope concluded that while gun control may be necessary in modern times, "advocates of the control of firearms should not argue that the Second Amendment did not intend for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the rights of the people."[587]

In a different view on the Framers' original intentions, law professor Eugene Volokh argued that the Founders emphasized the keeping and bearing of arms as a way to secure a well-regulated militia, but the prefatory clause of the Second Amendment did not limit the right to keep and bear arms to merely militia service. Volokh writes, "the Framers may have intended the right to keep and bear arms as a means towards the end of maintaining a well-regulated militia…they sought to further their purposes through a very specific means. Congress thus may not deprive people of the right to keep and bear arms, even if their keeping and bearing arms in a

[586] Robert E. Shalhope, "The Ideological Origins of the Second Amendment," *Journal of American History* 69 (1982): 612.
[587] Ibid., 614. There are many versions of the originalist argument to justify the individualist interpretation. For example, see Randy E. Barnett, "The Gravitational Force of Originalism," *Fordham Law Review* 82 (2014): 411-432; David I. Caplan, "Restoring the Balance: The Second Amendment Revisited," *Fordham Urban Law Journal* 5 (1976): 31-54; Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* (Chicago, IL: Ivan R. Dee, 2008); Glenn Harlon Reynolds, "A Critical Guide to the Second Amendment," *Tennessee Law Review* 62 (1994): 461-512; and William Van Alstyne, "The Second Amendment and the Personal Right to Arms," *Duke Law Journal* 43 (1994): 1236-1254.

particular instance doesn't further the Amendment's purpose."[588] Various versions of originalism have been the most common historical justification to defend the individualist interpretation, resting heavily on Anti-Federalist writings, the Pennsylvania Minority Report, and those state constitutions that granted a broad right to bear arms outside of militia service.

The Fourteenth Amendment

In a similar "correction" to constitutional history, some scholars have used the Fourteenth Amendment to justify the individual rights model. Lawyer Stephen P. Halbrook made this argument in several books and multiple articles, arguing that, read in conjunction with the Second Amendment, the Fourteenth Amendment created an individual right to keep and bear arms outside of organized militia service. Halbrook based his claims on the post-Civil War debates in Congress regarding the Thirteenth, Fourteenth, and Fifteenth Amendments; with the disarmament of newly freed slaves, the individual right to keep and bear arms should be guaranteed to protect all citizens from tyrannical state militias. For example, Halbrook cites Michigan Senator Jacob M. Howard's comments from the debate about the Fourteenth Amendment in 1866. Howard referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press…and the right to keep and bear arms," which for Halbrook meant that a "personal" right was the same as an "individual" right. Further, Halbrook understood Howard's position as an argument that the entire Bill of Rights should be incorporated against the states. Howard listed the whole of the Bill of Rights, describing each amendment in order to claim that they be included with "these privileges and immunities, whatever they may be – for they are not and cannot be fully defined

[588] Eugene Volokh, "The Commonplace Second Amendment," *New York University Law Review* 73 (1998): 805-806.

in their entire context and precise nature."[589] Halbrook also considered two pieces of legislation passed in conjunction with the Fourteenth Amendment: the Freedman's Bureau Act of 1866 and the Civil Rights Act of 1866. Read alongside the Second and Fourteenth Amendments, these provisions established "the rights of personal security and personal liberty [which] include the 'constitutional right to bear arms.'" According to Halbrook, "the Fourteenth Amendment was intended to incorporate the Second Amendment," which "protects the rights to personal security and personal liberty, which its authors declared in the Freedman's Bureau Act to include 'the constitutional right to bear arms.'" In sum, "to the members of the Thirty-Ninth Congress, possession of arms was a fundamental, individual right worthy of protection from both federal and state violation."[590]

The Right to Revolution

Finally, other scholars have made the argument that the Second Amendment guaranteed an individual right to keep and bear arms based on the natural right to revolution. According to this logic, an armed citizenry was necessary to deter the dangers of a tyrannical government: the threat of violence from armed citizens would prevent the government from violating personal rights. Sanford Levinson, for example, claimed that the Second Amendment protected the right of individual citizens to keep and bear arms so the people would be ready to revolt against a

[589] Stephen P. Halbrook, *That Every Man Be Armed* (Albuquerque, NM: University of New Mexico Press, 2013), 123. For scholars who make similar arguments, see Akhil Reed Amar, "The Second Amendment: A Case Study in Constitutional Interpretation," *Utah Law Review* 4 (2001): 889-914; Nelson Lund, "Anticipating Second Amendment Incorporation: The Role of the Inferior Courts," *Syracuse Law Review* 59 (2008): 185-200; and Michael P. O'Shea, "Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of 'Bearing Arms' for Self-Defense," *American University Law Review* 61 (2012): 585-676.

[590] Stephen P. Halbrook, *Freedman, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Santa Barbara, CA: Praeger, 1998), 43.

tyrannical government.[591] Law professor David C. Williams used the term "right to resistance," arguing that the Second Amendment was based on republican traditions: "The republican framers of the Second Amendment were painfully aware that ultimate political power would lie with those who controlled the means of force."[592] To mitigate this problem, the Framers sought to arm all citizens in a universal militia poised to resist the government; for modern times, Williams argued that the Second Amendment granted "the people the ultimate means of force," but worried that an unfettered armed populace would lack the necessary civic virtue to use this force for the greater good.[593]

Other scholars were more forceful in their defense of the right to revolution, citing recent examples of tyrannical political powers (domestic and abroad) that violated the rights of the people, including the right to bear arms. David B. Kopel and Christopher C. Little warned, "the Nazi Germany regime used registration records as a precursor to, or as a means of, confiscating guns within its own borders…and many gun owners are aware of this historical precedent."[594] To prevent such violations from occurring in the United States, the Second Amendment must be understood to guarantee the right of all individuals to armed resistance: "If Americans are to remain free – and to live as securely as freedom allows – then it must be recognized that guns play an important and necessary role in American society, and Americans have inherited the

[591] According to Levinson, "just as ordinary citizens should participate actively in government decision-making through offering their own deliberative insights, rather than be confined to casting ballots once every two or four years for those very few individuals who will actually make decisions, so should ordinary citizens participate in the process of law enforcement and defense of liberty rather than rely on professionalized peacekeepers, whether we call them standing armies or police." See Levinson, "The Embarrassing Second Amendment," 650-651.
[592] David C. Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment," *Yale Law Journal* 55 (1991): 553.
[593] Ibid., 615.
[594] David B. Kopel and Christopher C. Little, "Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition," *Maryland Law Review* 56 (1997): 458.

right to arm themselves against those foreign or domestic enemies who would deprive them of life and liberty."[595]

Critiquing Individual Rights Theory

Many variations on individual rights theory have emerged over time, with the British origins to the right to keep and bear arms, originalism, the right to bear arms under the Fourteenth Amendment, and the right to revolution serving as the most frequently used arguments to justify the individual rights model. In response to this prolific outpouring of scholarship advancing the individualist interpretation of the Second Amendment, political scientists, historians, and legal scholars revisited the history of the right to keep and bear arms to make counterarguments – or, in many cases, to restate the prevailing interpretation of the Second Amendment as a collective military right, not a personal right to armed self-defense. The academic debate between those supporting the individualist interpretation and those defending the collectivist reading produced an abundance of law review articles, many of which reassessed similar historical documents (for example, the British Declaration of Rights and key Founding documents) to reach different conclusions as to the "correct" rendering of the Second Amendment. The debate was dichotomized into those scholars who claimed that the Second Amendment guaranteed a personal right to armed self-defense independent of military activity versus others who maintained that the Second Amendment protected the collective right of the people to keep and bear arms in the common defense of tyranny, organized and regulated by the

[595] Kopel and Little, "Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition," 553. For other scholars who argue that the Second Amendment guarantees the right to revolution, see Alan M. Gottlieb, *The Rights of Gun Owners* (Ottawa, IL: Green Hill Publishing, 1981); Wayne LaPierre, *Guns, Crime, and Freedom* (Washington, DC: Regnery, 1994); and Glenn H. Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution," *Tennessee Law Review* 61 (1994): 647-673.

states.[596] Implicit to these abstract positions was a political stance on gun control, as the individualist interpretation was used to justify a more sweeping platform of gun rights. These theoretical disputes soon came to influence the increasingly polarized battle about guns in American politics, resulting in contentious political and legal arguments fraught with intense disagreement between rivaling sides.[597] Lawyer Don B. Kates, Jr. described the state of debate about the Second Amendment as bitterly divided, not merely an academic squabble contained to law journals, but a political battle as differing interpretations of the right to bear arms aligned with partisan positions on gun control:

> Debate has been sharply polarized between those who claim that the amendment guarantees nothing to individuals, protects only the state's right to maintain organized military units, and thus poses no obstacle to gun control (the "exclusively states' right" view), and those who claim that the amendment guarantees some sort of individual right to arms (the "individual right" view).[598]

For example, political scientist Robert J. Spitzer critiqued much of the individualist literature in an influential 2000 article, disagreeing with the logic of the individualist model and

[596] Given the number of articles defending the individualist interpretation, it is hardly surprising that there were innumerable responses. For example, see Robert H. Churchill, "Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment," *Law and History Review* 25 (2007): 139-175; Saul Cornell, *Whose Right to Bear Arms Did the Second Amendment Protect?* (Boston, MA: Bedford, 2000); Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York, NY: Oxford University Press, 2006); Paul Finkelman, "'A Well-Regulated Militia': The Second Amendment in Historical Perspective," in Carl T. Bogus, ed., *The Second Amendment in Law and History* (New York, NY: New Press, 2000), 117-147; Don Higginbotham, "The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship," *William and Mary Quarterly* 55 (1998): 39-49; David Thomas Konig, "Arms and the Man," What Did the Right to 'Keep' Arms Mean in the Early Republic," *Law and History Review* 25 (2007): 177-185; Jack N. Rakove, "The Second Amendment: The Highest State of Originalism," in Carl T. Bogus, ed., *The Second Amendment in Law and History* (New York, NY: New Press, 2000), 74-116; Lois G. Schwoerer, "To Hold and Bear Arms: The English Perspective," in Carl T. Bogus, ed., *The Second Amendment in Law and History* (New York, NY: New Press, 2000), 207-221; and H. Richard Uviller and William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent* (Durham, NC: Duke University Press, 2003).

[597] For a summary of the academic debate between the collective rights model and the individual rights model, see Carl T. Bogus, "The History and Politics of Second Amendment Scholarship: A Primer," in Carl T. Bogus, ed., *The Second Amendment in Law and History* (New York, NY: The New Press, 2000).

[598] Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (1983): 206.

questioning the veracity of evidence. Prior to substantive criticism, however, Spitzer evaluated the torrent of law review articles, cataloging close to three hundred articles from 1912 to 1999 regarding the Second Amendment and gun control, then organizing them according to the "court view" (or the collectivist interpretation) or as an individual right. Spitzer's goal was "not to retread the usual arguments, but rather to examine the provenance of the Second Amendment writings in law journals," which often "provide a uniquely fertile breeding ground for the development of defective constitutional analysis."[599] Rather, Spitzer sought to explain changes in Second Amendment research and how it had been depicted in the popular press by assessing the dominant arguments of the individualist literature and identifying common themes. For Spitzer, the meaning of the Second Amendment was clear: it was included in the Bill of Rights to mitigate Anti-Federalist fears about state sovereignty; it was an "assurance that the state militias would be allowed to continue as a viable military and political supplement to the national army at a time when military tensions within and between the states ran high, suspicions of a national standing army ran even higher, and military takeovers were the norm in world affairs."[600] The "New Standard Model" interpretation, then, was an untenable position, at odds with prevailing historical and legal evidence that radically misrepresented the true meaning of the Second Amendment: "The Second Amendment provides no protection for personal weapon use, including hunting, sporting, collecting, or even personal self-protection."[601] The courts had made clear that the Second Amendment protected citizen service in government-controlled militias; further, even if the Second Amendment did protect an individual right to keep and bear

[599] Robert J. Spitzer, "Lost and Found: Researching the Second Amendment," *Chicago-Kent Law Review* 76 (2000): 349.
[600] Ibid., 351.
[601] Ibid., 352.

arms, the Supreme Court refused to incorporate it under the Fourteenth Amendment, meaning it did not apply to the states.

Spitzer's critique of the "New Standard Model" was unequivocal in its assertion that the Second Amendment protected the collective right of the people to keep and bear arms in regulated militia activity, but was markedly restrained in tone compared to other scholarly retorts to the individual rights model. The tenor of many of these articles was frequently hostile: those advancing the individualist position often accused the other side of historical inaccuracies and "gibberish,"[602] while those defending the collectivist position accused these scholars of groupthink and criticized their research methods, using historical documents out of context and making unsubstantiated inferences.[603] For example, legal scholar Patrick J. Charles claimed that the "Standard Model scholars broke, and continue to break, virtually every objectivity and methodology norm accepted in the historical profession" and "manufactured history" to reach the desired outcome. [604] Charles referenced the individualist argument that British disarmament led colonists to claim a sweeping individual right to keep and bear arms, to which Charles responded that "the historical claim is patently absurd. There is not one piece of historical evidence that directly links the two."[605] Further, such articles were often based on inferences from letters and

[602] For example, Don B. Kates, Jr. claimed that the Second Amendment's protection of "right of the people" must "mean *something*" that the courts should enforce; any other interpretation was "patently nonsensical," "gibberish," and "nonsense on stilts." See Don B. Kates, Jr., "Modern Historiography of the Second Amendment," *UCLA Law Review* 56 (2009): 1226-1229.
[603] Referring to historical inaccuracies, historian Saul Cornell writes: "The structure of legal scholarship has served to spread these errors rather than contain them. Once published, these errors enter the canons of legal scholarship and are continuously recycled in article after article. Upon closer inspection, the new orthodoxy on the Second Amendment shares little with the Standard Model employed by physicists. Indeed, recent writing on the Second Amendment more closely resembles the intellectual equivalent of a check kiting scheme than it does solidly researched history." See Saul Cornell, "Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory," *Constitutional Commentary* 16 (1999): 223.
[604] Patrick J. Charles, *Armed in America* (Amherst, NY: Prometheus, 2018), 286.
[605] Ibid., 287.

texts that were either incomplete or taken out of context (or both)[606] and repeated so often among scholars to be accepted as hard historical fact.[607] Those critical of the individualist model also argued that the change in interpreting the Second Amendment was not a reflection of a profound shift in historical or legal thinking, but the result of concentrated and well-funded political campaign by likeminded historians and lawyers to promote the individualist interpretation, many of whom were funded by the NRA.[608]

Translating Theory into Politics

Renewed interest in the Second Amendment was not merely academic posturing, but reflected the strategic goal of the gun rights movement of providing legal justification to further advance the cause of gun rights in American politics. Historically, the Second Amendment had been outside the realm of political debate about gun rights: legal challenges to gun control legislation had been minimal, and no federal court had overturned a law regulating the private use of firearms on Second Amendment grounds. Gun rights activists, however, sought to change the prevailing interpretation of the Second Amendment and justify a constitutional defense of the

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[606] Historian Robert E. Shalhope, once a defender of the individualist interpretation, eventually changed sides: "Law reviews ranging from the most prestigious to the least distinguished offer their readers any number of interpretations of the [Second Amendment's] original meaning as well as the manner in which it should be read today. The result has been an abundance of sound and fury and a dearth of intellectual substance. All suffer the same handicap: a lack of understanding of the historical context within which the Second Amendment was written." See Robert E. Shalhope, "Book Review: H. Richard Uviller and William G. Merkel, *The Militia and the Right to Arms, or, How the Second Amendment Fell Silent*," *American Historical Review* 108 (2003): 1442-1443.

[607] Saul Cornell writes: "Thus, Akhil Amar cites Sanford Levinson, and David Williams cites Akhil Amar, and Glen Haran Reynolds cites Levinson, Amar, and Williams. None of these articles have been subjected to the sorts of blind peer review that scholarship published in journals such as the *William and Mary Quarterly*, *Journal of American History* or the *Law and History Review* must pass before publication. Once historical errors enter this closed system, they are endlessly repeated." See Cornell, "Commonplace or Anachronism: The Standard Model, The Second Amendment, and the Problem of History in Contemporary Constitutional Theory," footnote 12, 223.

[608] Spitzer, "Lost and Found: Researching the Second Amendment," 379; for further commentary on the NRA funding of individualist scholarship, see Patrick J. Charles, "The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing 'Standard Model' Moving Forward," *Fordham Urban Law Journal* 39 (2012): 1727-1864.

individual right to keep and bear arms. Many gun rights organizations included academic and research groups to promote the cause of gun rights, arguing that the Second Amendment protected the individual right to keep and bear arms for personal use. (For example, the Second Amendment Foundation is the research arm of the Citizens Committee for the Right to Keep and Bear Arms, formed in 1971 by gun owners who criticized the NRA as too moderate in its position. They are "dedicated to promoting a better understanding of our Constitutional heritage to privately own and possess firearms."[609] A similar group, Academics for the Second Amendment, was founded in 1992, composed primarily of lawyers committed to the individualist interpretation of the Second Amendment. The ASA argues that the Second Amendment does not protect the right of the states, but the right of the people, which presumes the individual right of all citizens to keep and bear arms: "Almost all of the qualified historians and constitutional-law scholars who have studied the subject concur. The overwhelming weight of authority affirms that the Second Amendment establishes an individual right to bear arms, which is not dependent upon joining something like the National Guard."[610] The goal of the ASA is to restore the Second Amendment to its proper place in constitutional scholarship and to encourage "intellectually honest discourse" on the individual right to keep and bear arms.[611] The Lawyer's Second Amendment Society does similar work, including subsidizing a legal defense fund to advocate against gun control laws.) Legal scholar Carl T. Bogus described their mission in 1998 as "part of a concerted campaign to persuade the courts to reconsider the Second Amendment, to reject what has long been a judicial consensus, and to adopt a different interpretation – one that would give the Amendment judicial as well as political vitality and

[609] https://saf.org.
[610] https://nraila.org/articles/20020620/academics-for-the-second-amendment.
[611] Scott Heller, "The Right to Bear Arms," *The Chronicle of Higher Education* (21 July 1995), A8.

would erect constitutional barriers to gun control legislation."[612] Overall, such groups have advanced highly focused political agendas, which has proven to be largely successful in achieving their objectives.

While many scholars maintained that the legal meaning of the Second Amendment was straightforward – that the courts established the right to keep and bear arms as a collective right – the movement in law journals continued to advance the individualist interpretation, as well as criticize gun control measures as unconstitutional. The consequence of this campaign was that the individualist interpretation emerged in the popular press and gained political traction; many newspaper and magazine articles declared that the Second Amendment had been newly discovered and demanded the courts correct their position to reflect the Framers' intentions. For example, Robert Spitzer cites a *Wall Street Journal* article from 1999 by Collin Levey that claimed, "a recently unearthed series of clues to the Framers' 'intentions' demand that the meaning of the Second Amendment be reexamined."[613] These "clues" included James Madison's notes about the drafting of the Second Amendment that inserted "the right of the people" as the first clause, as well as a letter from Thomas Jefferson to British scholar John Cartwright. Writing in 1824, Jefferson claimed "the constitutions of most of our states assert, that all power is inherent in the people...that it is their right and duty to be at all times armed." Spitzer noted that neither example provided new historical evidence nor was quoted is in proper context: Madison's early drafts of the Bill of Rights had already been widely researched by constitutional scholars; Jefferson's quote was taken out of context, as he was discussing state constitutions more generally and their ability to protect the people's sovereignty to self-govern,

[612] Carl T. Bogus, "The Hidden History of the Second Amendment," *U.C. Davis Law Review* 31 (1998): 316.
[613] Collin Levey, "Liberals Have Second Thoughts on the Second Amendment," *Wall Street Journal* (22 November 1999).

not the right to bear arms in particular.[614] Spitzer concluded that Levey's argument did not support an alternative position on the Second Amendment; further, Levey and others in the popular press who claimed that the individualist interpretation was the new academic consensus were falsely representing the correct meaning of the Second Amendment. For Spitzer, this was problematic because "such claims are, at best, an irrelevant distraction to determining what the Second Amendment actually means; at worst, they represent a shoddy effort to offer legitimacy to an argument that cannot stand well purely on its merits."[615] These theoretical debates would become increasingly relevant – and contentious – as the challenge of balancing gun rights with gun control became a critical national concern.

Individual Rights Theory and the Changing Politics of Gun Control

Individual rights scholars did not write their articles in a political vacuum: there were several external political factors that contributed to the shift in interpreting the Second Amendment from a collective right to an individual right, precipitated by a series of violent tragedies that escalated the issue of gun control to the forefront of American politics. First, in the 1990s, Congress established sweeping gun regulations that elevated the question of guns in America to the national agenda; as a result, debate about the proper scope of gun control intensified in rhetoric to become a pivotal partisan issue. Challenges to licensing and waiting periods, the assault weapons ban, and loopholes in existing gun laws became increasingly intense, especially in the wake of a series of high profile mass shootings. Also, the Second

[614] Jefferson's full quote reads: "The constitutions of most of our States assert, that all power is inherent in the people; that they may exercise it by themselves, in all cases to which they think themselves competent (as in electing functionaries executive and legislative, and deciding by a jury of themselves, in all judiciary cases in which any fact is involved), or they may act by representatives, freely and equally chosen; that it is their right and duty to be all times armed; that they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of the press." See Andrew A. Lipscomb, ed., *The Writings of Thomas Jefferson* XVI (Washington, DC: The Thomas Jefferson Memorial Association, 1904), 45.

[615] Spitzer, "Lost and Found: Researching the Second Amendment," 355.

Amendment became politically relevant with the advent of the "new militia" movement in which fringe groups protested encroachment by the federal government. No longer limited to debate in law journals, the Second Amendment became a powerful political symbol – which, if reinterpreted by the courts – could provide gun rights advocates with the constitutional justification for a sweeping individual right to keep and bear arms.

Federal Firearms Legislation

Traditionally, federal gun control measures focused on establishing laws that required a licensing system and a waiting period prior to the sale of handguns. The goal of such measures, many of which were proposed following a violent gun incident or mass shooting, was to allow authorities to conduct background checks prior to the sale of firearms and decelerate the transaction process to discourage impulsive gun purchases. The Brady Bill (named after former White House press secretary James Brady, who was gravely injured in the 1981 assassination attempt of President Ronald Reagan) was first introduced in 1987. While the bill was similar to past initiatives that required a waiting period prior to the purchase of a firearm, debate soon became highly polarized. The NRA immediately protested the Brady Bill, arguing that it represented a slippery slope in gun regulation – stricter laws would inevitably follow – and that it was onerous to law-abiding gun owners. The NRA raised money and organized grassroots protests and media campaigns to object the bill, gaining greater visibility for their agenda while elevating the question of gun rights to the broader political arena. The NRA proposed an alternative to the waiting period plan: an automated computerized system that could instantly run a background check on anyone purchasing a handgun (known as the Staggers Bill).[616] While

[616] "Rifle Group Restates Opposition to Bill Delaying Handgun Purchases," *New York Times* (New York, NY), 15 April 1999, 7.

promising in its potential to normalize the process across the states, the plan was problematic because most states did not have the technical capacity to establish such databases; further, organizing the vast amount of records required would be expensive and time consuming. The NRA's revisions were considered but not incorporated into the bill, though the Senate version changed the waiting period to five days and included the gun provisions as part of a broader omnibus crime bill.

The Brady Bill moved forward in 1993 with support of President Bill Clinton, though it was delayed in filibusters regarding the length of the waiting period. After much debate, the Brady Bill was signed into law on 30 November 1993.[617] The final bill included provisions that required a waiting period on the purchase of handguns, restrictions on those who were permitted to purchase weapons, and established administrative changes. First, the bill required a five day waiting period for the purchase of handguns for a duration of five years; eventually, the waiting period would be replaced with instant background checks once the technology was sufficient. Further, it specified in detail who was prohibited from procuring a handgun: those who had been convicted of a felony with at least a one year prison sentence or had a violence-based restraining order; those convicted of domestic abuse, buying or selling drugs, or a fugitive of the law; those deemed mentally unstable by a doctor or mental institution; and illegal aliens. The administrative changes included an increase in federal licensing fees and established the theft of guns from licensed firearms dealers as a federal crime. It also authorized federal funds to help states improve their gun records and encourage greater diligence from police forces to track weapons.[618]

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[617] "The Brady Bill and New York Guns," *New York Times* (New York, NY), 13 September 1990, 26; "Gun Control Act Wins Final Battle as G.O.P Retreats," *New York Times* (New York, NY), 25 November 1993, 1.
[618] Brady Handgun Violence Prevention Act (1993).

The Assault Weapons Ban of 1994 was the next piece of federal firearms regulation to come before Congress, the reaction to two deadly shooting sprees in which assault weapons were used (a schoolyard shooting in Stockton, CA in 1989 and a cafeteria shooting in Killeen, TX in 1991). The legislation issued a ten year ban on nineteen automatic weapons as well as similar models, categorizing semi-automatic weapons into rifles, pistols, and shotguns and specifying how each type would be considered a semi-automatic assault weapon, thus subject to the ban. Further, it clarified which weapons were exempt from the ban and also barred large capacity ammunition devices. It did not apply to weapons already in circulation or those weapons neither prohibited nor exempt.[619] Again, the legislation was opposed by gun rights groups and fiercely debated, but eventually signed into law.[620]

Concerns about gun loopholes following the tragic 1999 mass shooting at Columbine High School in Littleton, CO led to further federal efforts to curtail gun violence. The shooters had purchased their weapons at unregulated gun shows, motivating lawmakers to tighten laws around gun expositions and other events that fell outside of the existing legislation. The proposed bill, which passed the Senate, would have required background checks for guns purchased at pawn shops and gun shows; prohibited those convicted of gun crimes (including juveniles) from purchasing a weapon; required handguns purchased at gun shows to have a locking device; and prohibited high-capacity ammunition clips. The bill met opposition in the House, largely the result of the NRA's opposition campaign, which aggressively canvased members through direct mailings and phone drives to protest the bill. A weaker version of the

[619] Assault Weapons Ban of 1994 (Title XI of the Violent Crime Control and Law Enforcement Act of 1994).
[620] Katharine Q. Seelye "Bill to Ban Some Assault Guns Seems Headed to the House," *New York Times* (New York, NY), 4 May 1994, 1; Katharine Q. Seelye, "Assault Weapon Ban Allowed to Stay in Anti-Crime Measure," *New York Times* (New York, NY), 28 July 1994, 1.

bill was proposed, but did not pass.[621] These key pieces of gun regulation reveal a pattern that continues in contemporary American politics: in the wake of tragic gun incidents and mass shootings, Congress often reacts to the political call for increased gun regulation; in response, gun rights activists protest that such measures as unduly restrictive toward law-abiding gun owners, escalating the question of gun control to the national agenda and further polarizing the debate.[622]

The New Militia Movement

Another contextual development that contributed to the success of the individualist interpretation of the Second Amendment was the "New Militia" movement. So-called militia groups are not a new presence in American politics: the Ku Klux Klan organized themselves as an armed militia following the Civil War; Nazi supporters, the Silver Shirts, formed a military unit in 1930s; the 1960s saw far right groups like the Minutemen and leftist groups like the Weathermen armed in protest against the government.[623] But in the 1990s, this self-proclaimed "new patriot movement" vowed to fight against government "conspiracies" to strip citizens of their rights, particularly the right to keep and bear arms. These groups were loosely affiliated grassroots organizations committed to protesting gun legislation and preventing the federal encroachment of private property through armed protest. For example, groups such as the Militia of Montana and the Michigan Militia vehemently opposed the federal government's

[621] For a full account of the NRA's concentrated protest campaign against the assault weapons ban and congressional debate, see Robert J. Spitzer, "The Gun Dispute," *American Educator* (1999): 10-15.
[622] This pattern is typical in both gun control politics as well as other contentious political issues, resulting in increased polarization and partisan divide. See Murray Edelman, *The Symbolic Use of Politics*, 2nd edition (Chicago, IL: University of Illinois Press, 1985).
[623] Philip Jenkins, "Home Grown Terror," *American Heritage* (1995): 38-46. The Weathermen based many of their protest tactics on a radical tract, *Firearms and Self-Defense: A Handbook for Radicals, Revolutionaries, and East Riders* (Berkely, CA: International Liberation School/Peoples Office, 1969), which encouraged armed street fighting and urban warfare.

response to high-profile crisis situations, including the federal offensive on white supremacist Randy Weaver's home in 1992 and the invasion of the Branch Davidian compound in Waco, TX in 1999. Both episodes received extensive scrutiny (not just from separatist groups) and the federal government was accused with mishandling the events in its use of excessive force.[624]

While the new gun legislation passed in the 1990s was neither overly restrictive nor dissimilar from past state and federal laws, these fringe groups viewed it as the first step in complete disarmament and excessive federal meddling in private life. Far-right groups claimed to represent the spirit of colonial Minutemen, using the Second Amendment to justify the use of force to protest government tyranny. For example, militia member Mike Williams claimed in 1995: "This country is rapidly turning into a police state. A preventive measure against such tyranny lies in citizens militias…the Second Amendment is at the core of their existence. It is viewed as the last constitutional defense against a government bent on oppression."[625] Further, Michigan militia leader Norman Olson testified before the Senate Subcommittee on Terrorism, Technology, and Government Information in 1995 that an armed people, protected by the Second Amendment, would constitute the militia and provide the basis for security against "the increasing amount of federal encroachment into our lives," going further to claim that "the federal government needs a good spanking to make it behave."[626] Many of these fringe militia groups defended their position in language widely prevalent in the literature advancing the individualist interpretation of the Second Amendment, including the claim that the right to armed

[624] For a full account of the development of the new militia movement, see Jonathan Karl, *The Right to Bear Arms: The Rise of America's New Militias* (New York, NY: Harper Collins, 1995). The militia movement saw a resurgence in the mid-2000s; see Barton Gellman, "The Secret World of Extreme Militias," *Time* (30 September 2010), and again following the election of President Donald Trump; see Mike Giglio, "Civil War is Here, Right Now," *The Atlantic* (November 2020).
[625] Mike Williams, "Citizen Militias," *Soldier of Fortune* 20 (1995): 48.
[626] Steve Daley, "Feisty Militia Members Lecture Senate Committee," *Chicago Tribune* (Chicago, IL), 16 June 1995.

protest against the government was justified as both a constitutional right of the people to assemble into militias, and a natural right to revolt.

The new militia movement gained national publicity (and criticism) following the terrorist bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City in 1995, when it was revealed that bombers Timothy McVeigh and Terry Nichols were linked with the Michigan Militia. Public outcry was intense following this incident, as these "militias" were criticized as having nothing to do with the constitutional militia enshrined in the Second Amendment.[627] Revisiting the text and history of the Second Amendment, it was clear that the militia as understood by the Framers was only legitimate if organized under the auspices of the state governments (and later, by the federal government under the National Guard). The purpose of the militia was to protect the country from threats both foreign and domestic, not to perpetuate them; further, the Second Amendment did not provide a right for the people to attack their government under the veil of militia activity. Rather, the political processes of the United States government offered many avenues of peaceful means to address grievances without the use of armed force.

Pressuring the Courts

In response to the changing politics of gun control and their own political objectives, the "New Standard Model" scholars were successful in bringing increased visibility to an alternative view of interpreting the Second Amendment. This meant that the right to keep and bear arms transformed from a nominal constitutional question to a highly contentious partisan issue. The NRA capitalized on this debate to utilize the individualist interpretation to advance their political

[627] Morris Dees and Mark Potok, "The Future of American Terrorism," *New York Times* (New York, NY), 10 June 2001, 15.

goals, which included limiting new gun control measures, challenging those already in place, and forcing the courts to revisit its historical interpretation of the Second Amendment. For example, a NRA membership letter from 1995 warned that all gun laws were an attack on the Second Amendment; further, limiting Second Amendment rights was the first step to curtailing other rights protected by the Bill of Rights. Referring to the federal government, the letter warned:

> They try to take away our right to bear arms…they don't want you to own a gun. And they'll stop at nothing until they've forced you to turn over your guns to the government. *If the NRA fails to restore our Second Amendment freedoms, the attacks will begin on freedom of religion, freedom of speech, freedom from unreasonable search and seizure…*[628]

The NRA and other groups advancing gun rights had been primarily concerned with limiting restrictive gun laws in Congress, but now turned their attention to the courts. To be politically secure, gun rights activists needed legal justification that the Second Amendment protected the individual right to keep and bear arms; only then would their position on limiting gun legislation be constitutionally viable.

The courts, however, did not agree with the individualist interpretation. Retired Justice Lewis F. Powell opined in 1988: "With respect to handguns, it is not easy to understand why the Second Amendment, or the notion of liberty, should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number of murders in the United States."[629] Former Chief Justice Warren Burger went further, accusing the NRA of having "trained themselves and their people to lie" about the historical context of the Second Amendment and that their campaign to promote an individualist interpretation was "one of the

[628] NRA Membership Publication, cited in Jack Anderson, *Inside the NRA* (Beverly Hills, CA: Dove Books, 1996), 14.
[629] Saundra Torry, "Retired Justice Powell: No Constitutional Right to Own Handguns," *Washington Post* (Washington, D.C.), 8 August 1988, 4.

greatest piece of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime."[630] Despite robust criticism, individualist scholars persisted, enough to eventually influence the Supreme Court to address the scope of the Second Amendment directly in *District of Columbia v. Heller* in 2008.

Limitations of the Debate

While the gun rights movement has been largely successful in achieving its political and legal goals, the question of the Second Amendment – and how its constitutional interpretation should be applied to the modern debate about gun rights in American politics – is far from settled. The institutional foundation of the Second Amendment, the state militia system, remains its basis and must be reconciled with its current understanding as an individual right. The outpouring of law review articles defending the individualist position was intended to encourage the Supreme Court to address the question of whether the Second Amendment protected an individual right to keep and bear arms for personal self-defense. Much of the academic debate regarding the interpretation of the Second Amendment, however, occurred prior to the Supreme Court's landmark decisions in *District of Columbia v. Heller* (2008) and *McDonald v. Chicago* (2010). Revisiting this legal scholarship is critical to understanding the full context and impact of *Heller* and *McDonald*, but it also raises the difficulty of how useful this debate is to the contemporary political struggle of balancing the right to bear arms – now firmly entrenched by the Supreme Court as an individual right, protected from the states as well as the federal government – with the necessity of gun regulation.

In theory, the Supreme Court has settled the issue: the Second Amendment protects the individual right to keep and bear arms for personal self-defense unrelated to militia-related

[630] "Warren Burger on the NRA," *Washington Post* (Washington, D.C.), 18 April 1993, 6.

activity. This novel legal position, however, has not radically changed the politics of gun control, nor has it brought closure to a highly fraught political debate, leaving open a series of questions about the proper scope of the Second Amendment. For example, if the individualist interpretation is accepted as correct, what are the boundaries of that right? On the other hand, if this interpretation is incorrect, is there anything to be garnered from maintaining the collectivist interpretation of the Second Amendment? Finally, is there a way to create a positive vision of the right to keep and bear arms that allows for both the protection of rights and reasonable regulation? To addresses these challenges, it is necessary to step away from the academic debate about the collectivist interpretation versus individualist interpretation and reframe the question: what is the foundation of the Second Amendment, and how does its fundamental constitutional principles influence the debate about gun rights in American politics?

Reviving the States

While the Second Amendment has been historically interpreted as a collective right, most Americans accept that the Second Amendment protects an individual right to bear arms.[631] Where, then, does that leave the Second Amendment, given that the preamble directly refers to the militia? There are several options. First, the Second Amendment could be dismissed as a quaint anachronism that provides insights into the past, but bears no weight in contemporary American politics. Traditionally, the right to keep and bear arms was understood to protect the states' right to arm their militias; the United States no longer relies on state militias, however, and is protected by professional standing armies, the National Guard, and well-trained state and federal police forces. Without the state militia system, it could be argued that the Second

[631] Jeffery M. Jones, "Americans in Agreement with Supreme Court on Gun Rights," https://news.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx, 26 June 2008. For current statistics and trends over time, see https://news.gallup.com/poll/1645/guns.aspx.

Amendment is a moot point. Another approach would be to set aside the inconvenient clause ("A well regulated Militia, being necessary to the security of a free State") as an unnecessary preface and emphasize instead "the right of the people to keep and bear Arms" to justify an individual right. This approach would focus on "the people" rather than the militia, who are entitled to the individual right to bear arms independent of militia activity, including self-defense and protection against threats to personal liberty. Another option would be a constitutional amendment to remove the troublesome preamble so the Second Amendment would clearly protect the right of the people to bear arms outside of militia activity.

Such scenarios, however, overlook the foundation of the Second Amendment. The Second Amendment was written to protect the states: historically, this meant the states were guaranteed the right to arm their militias and protect themselves from federal encroachment. Now, because of changing patterns of federalism, the role of the states in gun policy, and the incorporation of the Second Amendment against the states in *McDonald v. Chicago*, the Second Amendment as applied to the states is radically different. Contemporary debate about the politics of gun control and the Second Amendment emphasizes individual rights over states' rights, but this does not mean the states are irrelevant to the evolving paradigm of gun rights; rather, the states play a pivotal role in defining the parameters of the right to keep and bear arms. Guns represent different things to different groups, and these loyalties, which will affect gun policy, are more easily accounted for at the state level. Throughout America's past, the states have been at the forefront of gun regulation; understanding the Second Amendment to prioritize the states (while still protecting the individual right to keep and bear arms) respects past interpretations while still moving forward to meet new challenges. Further, allowing for a Second Amendment that includes a robust role for the states means two things: first, the states

can be tasked with developing reasonable gun regulation that responds to specific needs; and second, the states may expand the right to keep and bear arms within their constitutional mandate. These dual roles under the Second Amendment are not contradictory; rather, the states retain their traditional role in both protecting *and* expanding rights. For this argument to stand, however, the question of incorporation must be addressed: does the Second Amendment still protect the states, or has incorporation limited state authority – and if so, what are the implications for the current debate about gun rights in American politics?

Chapter Ten:

The Supreme Court Decides

Given the highly contentious debate about gun rights in American politics, it would be fair to assume that the right to bear arms has been one of the most highly litigated issues in the courts – especially given the American penchant for adversarial legalism. Rather than address political disagreements through "bureaucratic administration, or on discretionary judgement by experts or political authorities, or on the judge-dominated style of litigation common in other countries," the American political process is often characterized by a system of "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation." There is an irony, however, when it comes to the interpretation of the Second Amendment and how it applies to the politics of gun control: while gun rights advocates have largely relied on the tactics of adversarial legalism to advance a robust platform of gun rights, including "lawyers, legal threats, and legal contestation in implementing public policies…[and] striving to hold governmental official accountable,"[632] the courts have not fully settled the question of how the issue of gun rights should be debated and resolved in American politics. Even as the gun rights movement succeeded in pressuring the Supreme Court to address the question of the Second Amendment directly – and to fundamentally change its established legal interpretation – the influence of the courts did not have the political impact expected by gun rights advocates, leaving open not only critical questions about the scope of gun rights, but also the broader issue of balancing the authority of the states and the federal government in reconciling these rights.

[632] Robert A. Kagan, *Adversarial Legalism* (Cambridge, MA: Harvard University Press, 2001), 3.

Reframing the Legal Debate

Still, it would be impossible to analyze the political development of the Second Amendment without accounting for the sweeping changes to its legal meaning, and how these interpretive shifts have influenced the increasingly problematic question of gun rights in American politics. The Supreme Court codified the right to keep and bear arms as an individual right in the landmark decision *District of Columbia v. Heller* (2008), and later incorporated it against the states in *McDonald v. Chicago* (2010). *Heller*'s assertion that the Second Amendment protects the individual right to keep and bear arms for personal self-defense overturned years of jurisprudence that understood the Second Amendment as a right of the states, leaving their role in the contemporary debate about gun rights unclear: if the Second Amendment guarantees an individual right to keep and bear arms – a fundamental right that is incorporated against the states – what powers do the states retain in regulating firearms? Read simply, the *Heller* and *McDonald* decisions could effectively remove the states from the political process of gun legislation by limiting the scope of their authority, which is problematic in terms of both the politics of gun control as well as broader questions of federalism.

On the other hand, however, incorporating the Second Amendment could actually revive the state's power to regulate arms, meaning that the right of the people to keep and bear arms in connection to state militia service would not be infringed. Prior to incorporation, the Second Amendment only limited the federal government from impeding or limiting gun rights, but now applies to the states, meaning that incorporation – rather than constraining state governments from regulating firearms – could in fact allow them to play a central role in expanding gun rights. The legal debate about the Second Amendment must be reframed to reconcile its recent interpretation as an individual right with its long history as a collective right of the states, as

much of the existing scholarship limits arguments about the Second Amendment to *either* an individual right *or* a collective right, assuming that adhering to one position necessarily negates the other. Further, there is a notion that each interpretation aligns with a partisan stance on gun control: the individualist interpretation promotes sweeping gun rights by limiting state and federal authorities from regulating firearms, an argument more resonant with conservatives, while the collectivist standpoint supports increased gun control, usually favored by liberals. These positions are not mutually exclusive, however. The right to keep and bear arms can exist under a system of well-regulated liberty that balances both competing positions on gun control, as well as state and federal interests. Incorporation has not limited state action, as might be expected, but has in fact allowed the states to play an active role in both regulating guns *and* expanding gun rights, resulting in a diverse scheme of gun legislation that reflects a balanced pattern of federalism, which was, and still should be, the foundation of the Second Amendment. To justify this argument, however, it is necessary to analyze the legal environment that has reinterpreted the right to keep and bear arms as an individual right, and how this interpretive shift has influenced the debate about gun rights in American politics.

The Second Amendment in the Modern Courts

Under the doctrine of preferred freedoms, some rights protected by the Bill of Rights are considered more essential than others and will be met with greater scrutiny by the courts, including the right of free speech, freedom of the press, freedom of religion, and the right to counsel.[633] In general, the rights established by the First Amendment have been considered the most important; the rights of free speech and expression were, according to Justice Benjamin Cardozo in 1937, "the matrix, the indispensable condition, of nearly every other form of

[633] Henry J. Abraham, *Freedom and the Court* (New York, NY: Oxford University Press, 1972).

freedom" and among the first to be incorporated against the states through the Fourteenth Amendment.[634] While many gun rights supporters have argued that the Second Amendment is the most important amendment in the Bill of Rights, historically the courts did not agree. Prior to *Heller*, the courts adhered to the collectivist interpretation of the Second Amendment that protected the states' power to arm their militias and only limited federal authority; further, the Supreme Court did not consider the right to bear arms a pressing constitutional question, but more an issue of federalism. Chief Justice Morrison Waite wrote in *United States v. Cruikshank* (1876):

> The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the Amendments that has no other effect than to restrict the powers of the National Government.[635]

Subsequent courts did not stray from this position, consistently maintaining the collectivist position on the Second Amendment. For example, the Fourth Circuit ruled in 1995 that following *United States v. Miller* (1939), "the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."[636] Further, the Ninth Circuit asserted in 1996: "We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen."[637]

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[634] *Palko v. Connecticut* (1937).
[635] *United States v. Cruikshank* (1876).
[636] *Love v. Pepersack* 47 F.3d 120, Fourth Circuit (1995).
[637] *Hickman v. Block* 81 F.3d 98, Ninth Circuit (1996). For further examples of circuit court rulings that held the Second Amendment protected the right to keep and bear arms only in connection with state militia activity, see *Gillespie v. City of Indianapolis*, 185 F.3d 693, Seventh Circuit (1999); *United States v. Smith* 171 F.3d 617, Eighth Circuit (1999); and *United States v. Napier*, 233 F.3d 394, Sixth Circuit (2000).

This position was reiterated by the Supreme Court. For example, *Lewis v. United States* (1980) challenged the restriction from the 1968 Gun Control Act that prohibited felons from owning guns. The Court established a lower standard of scrutiny (compared to other violations of the Bill of Rights) and argued that restrictions on gun ownership merely required a "rational basis," meaning that the law must have a clear and reasonable purpose. Based on the statute's "plain meaning," the Court concluded that "Congress intended that the defendant clear his status [as a felon] before obtaining a firearms, thereby fulfilling Congress' purpose to keep firearms away from persons classified as potentially dangerous or irresponsible."[638] While not a Second Amendment case, *United States v. Lopez* (1995) further articulated the Court's understanding of the right to bear arms as a protection for the states from federal encroachment. *Lopez* overturned the federal Gun-Free School Zones Act of 1990, which prohibited guns in public schools; the Court ruled that, in declaring it a federal crime to possess a gun on public school grounds, Congress had overstepped its authority to regulate interstate commerce. If such a sweeping notion of the Commerce Clause was allowed to persist, "it is difficult to perceive any limitation on federal power, even in areas…where States historically have been sovereign."[639] (The Court made a similar argument in *United States v. Morrison* (2000), which overturned a section of the Violence Against Women Act regarding firearms; the Court argued that, similar to *Lopez*, the statute "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce.")[640]

[638] *Lewis v. United States* (1980).
[639] *United States v. Lopez* (1995).
[640] *United States v. Morrison* (2000).

Anticipating a Change

While the Supreme Court had refrained from specifying the exact nature of the right secured by the Second Amendment, the prolific outpouring of law review articles espousing the individualist interpretation encouraged the courts to directly address the question. On the cusp of the new millennium, there were indications that the Second Amendment would soon receive increased attention. For example, Justice Antonin Scalia was concerned that limiting the right to keep and bear arms was part of a broader pattern of curtailing fundamental rights. Writing in 1997, Scalia opined:

> Few tears [would be] shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. This would simply show that the Founders were right when they feared that some future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may tolerate the abridgement of property rights and the elimination of a right to bear arms; but we should not pretend that these are not reductions of rights.[641]

Soon after, the Supreme Court expanded its position on gun control in in *Printz v. United States* (1997), which challenged the Brady Bill's requirement of a five day waiting period prior to procuring a handgun to allow for a background check. The Court overturned the law, arguing that it was a violation of the Tenth Amendment to require state and local law enforcement officials to conduct background checks.[642] Further, Justice Clarence Thomas hinted at the Court's evolving view of the Second Amendment in a concurring opinion:

> The Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the

[641] Antonin Scalia, "*Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in Amy Gutmann, ed., A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997), 43.
[642] *Printz v. United States* (1997).

> Federal Government's regulatory scheme…runs afoul of that Amendment's protection. As the parties did not raise this argument, however, we need not consider it here.[643]

Following these indications that the courts were changing their position on the Second Amendment, the Fifth Circuit overturned years of precedent to rule that the Second Amendment guaranteed an individual right to keep and bear arms independent of organized militia service in *United States v. Emerson* (2001). *Emerson* originated from a Texas case that challenged a federal gun law on Second Amendment grounds. Timothy Joe Emerson was charged with threatening his family – who had a restraining order against him – with a gun, which violated the Public Safety and Recreational Use Protection Act or Violent Crime Control and Law Enforcement Act of 1996. This bill addressed violence against women and contained several provisions regarding firearms, including prohibiting those with restraining orders from possessing weapons. The Texas court ruled the law violated Emerson's Second Amendment rights, arguing that the Second Amendment "protects the rights of individuals, including those not then actually a member of any militia or engaged in active military service training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons." This right was not unlimited, however, but subject to "limited, narrowly tailored specific exemptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."[644] The ruling was subsequently appealed to the Fifth Circuit Federal Court of Appeals.

[643] *Printz v. United States* (1997).
[644] *United States v. Emerson*, 46 F.Supp. 2d 598, Texas (1999).

Testing the Individual Rights Model

While the Second Amendment had received much attention in scholarly articles, *Emerson* was the first legal test case for the individualist interpretation of the Second Amendment. The court summarized the various interpretations of the Second Amendment: the collectivist (or states' rights) interpretation, which protected the states' right to arm their militias; the "sophisticated collective rights model," which was essentially a limited individual right – individuals had the right to keep and bear arms in order to serve in the militia – and any law that prevented them from doing so would violate the Second Amendment; finally, the individualist interpretation, which guaranteed the right of individuals to keep and bear arms for private use. After analyzing the text, history, and jurisprudence of the Second Amendment, the court concluded: "We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training."[645]

While the Fifth Circuit ruled that the Second Amendment protected an individual right to keep and bear arms, they maintained the government's right to regulate firearms, though such laws should be subject to greater scrutiny. The decision in *Emerson*, then, was ambivalent: on one hand, the court ruled that the Second Amendment protected the individual right to keep and bear arms; on the other, it upheld the federal gun law challenged by Emerson, which prohibited any person under a domestic restraining order to possess firearms. The court deferred to

[645] *United States v. Emerson*, 270 F.3d 203, Fifth Circuit (2001). To rectify this new position with the precedent established in *United States v. Miller* (1939), the court claimed: "We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with *Miller*, that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*."

Congress for gun regulation, allowing that while the Second Amendment protected an individual right, "that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions" and Congress had broad latitude to regulate that right.[646] Rather than result in a definitive win for gun rights, *Emerson* changed the interpretation of the right to bear arms without fundamentally altering the way that right was regulated. Further, it stood alone: no other federal courts issued similar rulings. In other words, while the Fifth Circuit reinterpreted the legal meaning of Second Amendment to protect an individual right, the politics of gun control did not drastically change, indicating that the debate about gun rights would eventually be reconciled through the political process, not in the courts.

Still, the Justice Department changed its long standing position on the Second Amendment to align with the individualist interpretation following the decision . In response to *Emerson*, Attorney General John Ashcroft argued:

> *Emerson* is also noteworthy because, in upholding this statute, the Fifth Circuit undertook a scholarly and comprehensive review of the pertinent legal materials and specifically affirmed that the Second Amendment "protects the right of *individuals*, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms…" The Court's opinion also makes the important point that the existence of this individual right does not mean that reasonable restrictions cannot be imposed to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse. In my view, the *Emerson* opinion, and the balance it strikes, generally reflects the correct understanding of the Second Amendment.[647]

Further, Ashcroft issued a memo to the United States Attorneys arguing that the right to keep and bear arms was not limited to militia service. According to the Framers' "original intent," the text

[646] *United States v. Emerson*, 270 F.3d 203, Fifth Circuit (2001).
[647] John Ashcroft, "Brief for the United States in Opposition at Appendix, *Emerson v. United States*," 122 S. Ct. 2362 (2002).

"clearly protects the right of individuals to keep and bear firearms," though this right was not unlimited but "subject to reasonable restrictions."[648]

District of Columbia v. Heller (2008)

While there were indications that the lower courts and the federal government were moving toward the individualist interpretation of the Second Amendment, this position could not be fully justified until the Supreme Court issued a definitive decision. *District of Columbia v. Heller* (2008) was a carefully cultivated Second Amendment test case, crafted under the leadership of Clark Neily, a libertarian lawyer for the Institute of Justice. Neily and other lawyers launched a campaign to bring the Second Amendment to the forefront of the legal debate about the right to bear arms by challenging the District of Columbia's handgun law, the most stringent law in the country that limited handgun ownership for both criminals and law-abiding citizens. The District of Columbia's 1975 Firearms Control Regulation Act included three main provisions. First, it prohibited D.C. residents from owning a handgun, with two exceptions: for police officers or those who had registered their weapon prior to 1976; second, the law required a license for anyone who carried a handgun, including inside their home or place of business; finally, the statute required that all weapons (not just handguns) be stored "unloaded, disassembled, or bound by a trigger lock or similar device."[649] Six D.C. residents, including longtime resident Dick Heller, challenged the law, arguing that the Second Amendment protected the right to keep and bear "functional" firearms (including handguns) for self-defense in their homes. Heller worked as a government security guard and was required to carry a

[648] John Ashcroft, "Memorandum to All United States' Attorneys re: *United States v. Emerson*, November 9, 2001." See also John Ashcroft, "Whether the Second Amendment Secures an Individual Right," *Opinions of the Office of Legal Counsel* 28 (2004), 128-129.
[649] District of Columbia Firearms Control Regulation Act of 1975 (1976).

firearm in the line of duty, but was denied a handgun permit that would allow him to keep his weapon at home. The District Court dismissed the claim, rejecting the argument that the Second Amendment protected an individual right to keep and bear arms outside of militia service. The court argued that the plaintiffs failed to make a compelling Second Amendment claim, stating that it "would be in error to overlook sixty-five years of unchanged Supreme Court precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia."[650]

After the district court dismissed the case, the plaintiffs appealed to the District of Columbia Circuit Court, where a divided court reversed the district's ruling. The court argued that "the people" described in the Second Amendment referred to individuals; further, because state militias no longer existed, the collective rights theory maintained by the district court would render the Second Amendment a moot point.[651] Thus the scope of the right should be construed more broadly than previously interpreted: the Second Amendment protected the right to bear arms for various law-abiding purposes, including for sport, hunting, and individual self-defense. Still, this right was subject to reasonable regulations – which did not include D.C.'s handgun laws because they were too stringent. Heller's lawyers then pushed the case forward to the Supreme Court.[652]

[650] *Parker v. District of Columbia* 311 F. Supp. 2d, D.D.C. (2004).
[651] *Parker v. District of Columbia* 478 F.3d 370, D.C. Circuit (2007).
[652] For a full overview of *Heller*'s litigation history, see Robert A. Levy, "Anatomy of a Lawsuit: *District of Columbia v. Heller*," *Engage* (October 2008): 27-30; and Clark Neily, "*District of Columbia v. Heller*: The Second Amendment is Back, Baby," *Cato Supreme Court Review* (2007-2008): 127-159.

The New Standard Model in the Supreme Court

For those advancing the individualist interpretation of the Second Amendment, *Heller* was an ideal test case: Dick Heller was a sympathetic plaintiff, an upstanding citizen required to carry a firearm in the line of duty but not permitted to keep a weapon in his house; further, challenging the D.C. handgun ban bypassed the issue of incorporation since it was a federal statute not applicable to the states. Heller's lawyers assembled a sophisticated legal team of activists linked to the Cato Institute and the Institute of Justice, including influential libertarian donor and lawyer Robert A. Levy, New Standard Model scholar Stephen P. Halbrook, and experienced lawyer Alan Gura as lead council. The question before the Supreme Court addressed the origins of the Second Amendment: was the Second Amendment originally understood to protect an individual right to bear a weapon in self-defense, and if so, was there a historical justification for the individual rights theory of the Second Amendment?

Given the volatile nature of the political debate about gun rights, the decision was highly contentious both in the Supreme Court and in the court of public opinion. There were many highly motivated players involved: politicians, lawyers, political scientists, and special interest groups on both sides of the gun debate filed amicus briefs and the case was closely followed by the many actors invested in the outcome of the case.[653] Of the prolific amicus briefs filed in *Heller*, most referenced the historical origins of the Second Amendment and the Court's previous majority opinions and dissents to make an argument either for or against the individualist interpretation.[654] For example, a group of political scientists and lawyers authored the

[653] Sterling Meyers, "Gun Fanciers, Foes Get Day in Court; Hundred Line Up to See History Being Made," *Washington Times* (Washington, D.C.), 19 March 2008, B1.
[654] For an overview of the many amicus briefs filed, see Ilya Shapiro, "Friends of the Second Amendment: A Walk through the Amicus Briefs in *D.C. vs. Heller*," *Journal on Firearms and Public Policy* 20 (2008): 15-41.

"Professional Historians' Brief," which argued that at the Founding, "outside of the question of whether militia members would be armed at national, state, or personal expense, there was no credible basis upon which the national government could regulate possession of firearms."[655] In other words, the issue of the federal government restricting the private ownership of firearms was not a concern to the Framers. Further, the Second Amendment was intended to protect the right of the states, not the individual right to keep and bear arms; the government could not regulate the possession of firearms, but they would not need to as there was no constitutional right to armed self-defense.[656]

The Decision

In response to the question posed in *Heller* – whether the Second Amendment protected the right to armed self-defense, and if the individualist interpretation could be historically justified – the divided Court argued that the Second Amendment protected the right of individuals to keep and bear arms (including handguns) in their homes for personal self-defense; this right was not unlimited, but subject to reasonable regulation. As a result, the traditional understanding of the Second Amendment as a collective right was replaced with the individualist interpretation, overturning decades of jurisprudence. Further, the D.C. handgun law was ruled unconstitutional because it effectively amounted to a full ban on handguns, as its cunning logic outlawed the registration of handguns while declaring it a crime to possess an unregistered

[655] Jack N. Rakove, Saul Cornell, David T. Koonig, William J. Novak, Lois G. Schwoerer et al., "Brief of Amici Curiae in Support of Petitioners in *District of Columbia v. Heller*" (2008), 33-34.
[656]As discussed in Chapter Four, one of the primary concerns regarding the right to bear arms at the Founding centered on supplying weapons to state militias rather than restricting personal arms. Rakove et al. write: "Even when the Anti-Federalists spoke of the militia being disarmed, their expressed concern was not the specter of federal confiscation or prohibition of private weapons, but rather than the national government might neglect to provide arms. They worried that militiamen might be subject to military justice, or marched to faraway locations, to their personal inconvenience and the insecurity of their own communities." See "Brief of Amici Curiae in Support of Petitioners in *District of Columbia v. Heller*" (2008), 21-22.

handgun. The 5-4 decision was split along partisan lines: conservative justices Scalia, Roberts, Thomas, and Alito were joined by Justice Kennedy in the majority opinion arguing for the individualist interpretation, while liberal justices Stevens, Souter, Ginsburg, and Breyer dissented in support of the collectivist position. Justice Anthony Kennedy was the deciding vote and focused his attention on how the prefatory clause of the Second Amendment animated the operative clause; for Kennedy, the "the right of the people" must be made manifest, not limited to the historical institution of the militia.[657]

Justice Antonin Scalia wrote the majority opinion, affirming the D.C. Circuit Court ruling that the Second Amendment guaranteed the individual right to keep and bear arms: "Our central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." The opinion was based on extensive historical analysis of the text of the Second Amendment, the Framers' original intent and the "original public meaning" of the amendment, and how the historical context should be applied to contemporary gun regulations. In analyzing the two clauses of the Second Amendment, the Court concluded that "the prefatory clause does not limit…the scope of the operative clause." To justify this position, Justice Scalia articulated a detailed definition of the operative clause: the "the right of the people," read in conjunction with the rest of the Bill of Rights, referred to an individual right, one that is "exercised individually and belongs to all Americans."[658]

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[657] Linda Greenhouse, "Justices, Ruling 5-4, Endorse Personal Right to Own Gun," *New York Times* (New York, NY), 27 June 2008; and Bill Mears, "High Court Strikes Down Gun Ban," www.cnn.com/2008/US/06/26/scotus.guns/index.html, 26 June 2008.
[658] *District of Columbia v. Heller* (2008).

Justice Scalia went on to analyze the key concepts of the Second Amendment, focusing heavily on the phrase "to keep and bear arms." *Arms* referred the sorts of weapons familiar to the Framers, criteria which still applied in modern times: "Any thing that a man wears for his defence, or takes into his hands, or uses in wrath to cast at or strike another," was a universal definition that included weapons not specified for military use. *To keep* arms indicated a "common way of referring to possessing arms, for militiamen *and everyone else*." Finally, *to bear* arms meant carrying a weapon for its intended purpose, though the phrase itself did not "connote participation in organized military service." For Justice Scalia, these definitions applied at the Founding and still held true in contemporary America: at the Founding, the Second Amendment was "widely understood" to protect an individual right, a historical detail crucial to its modern interpretation. In sum, the operative clause of the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[659]

Despite Justice Scalia's claim to historical fidelity, the prefatory clause – arguably the core of the Second Amendment – received little attention in comparison to the operative clause. A "well regulated Militia" meant simply all "able-bodied men…capable of acting in concert with the common defense," not a state or federally mandated military organization; "the security of a free State" referred not to the specific states, but the security of the nation as a whole. In order to rectify the two clauses, the Court emphasized the notion of a pre-constitutional right to bear arms that included hunting and self-defense. The original language was necessary to protect the militia from threat because "tyrants had eliminated a militia of all the able-bodied men…by taking away the people's arms" and the militia "might be necessary to oppose an oppressive military force if the constitutional order broke down." Thus the prefatory phrase merely

[659] *District of Columbia v. Heller* (2008).

provided context, rather than to fully articulate the scope of the right established by the operative phrase.[660]

The new definition of the right to keep and bear arms was markedly at odds with the collectivist interpretation of the Second Amendment previously established by the Supreme Court. To justify its position, the Court needed to account for how this interpretation could be reconciled with precedent, particularly the ruling in *United States v. Miller* (1939), which held that the right to bear arms was limited to militia service. Jack Miller's sawn-off shotgun did not contribute "to the preservation or efficiency of a well regulated militia," thus "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment, or that its use could contribute to the common defense."[661] The *Heller* majority claimed that *Miller* merely dealt with the type of weapons protected by the Second Amendment, not the full scope of the right: since *Miller* focused on a narrow question (the constitutionality of a sawn-off shotgun crossing state lines) rather than a comprehensive definition of the Second Amendment, the ruling simply meant that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barrel shotguns."[662] Still, while the majority claimed that the Second Amendment protected the individual right to keep and bear arms for personal self-defense, similar to "most rights, the right secured by the Second Amendment is not unlimited." The Court clarified its position:

> Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of

[660] *District of Columbia v. Heller* (2008).
[661] *United States v. Miller* (1939).
[662] *District of Columbia v. Heller* (2008).

> firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms.[663]

The Court declined to specify precisely which weapons were protected under the Second Amendment, arguing rather that the legality of a specific weapon must be determined "by the historical tradition of prohibiting the carrying of dangerous and unusual weapons," which included most "presumptively lawful" regulations.[664]

Having articulated a novel legal understanding of the Second Amendment as guaranteeing an individual right, the majority then ruled that the District of Columbia's ban on handguns was unconstitutional for three reasons. First, the statute essentially prohibited "an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose," which was unconstitutional because the Second Amendment protected the individual right to self-defense, "central to the Second Amendment right." Second, the handgun ban included private homes, where "the need for defense of self, family, and property is most acute." Finally, requiring that handguns remain inoperable within the home "makes it impossible for citizens to use them for the core lawful purpose of self-defense." *Heller*, in reversing decades of Second Amendment jurisprudence and overturning one of the most restrictive gun control laws in the country, also hinted that there was more to come in terms of expanding gun rights, including incorporating the Second Amendment against the states. The Court noted that they "may as well consider at this point (for we will have to consider eventually) what types of weapons *Miller* permits," implying an evaluation of the permissibility of state regulations. Further, the Court included a list of "presumptively lawful regulatory measures," many of which

[663] *District of Columbia v. Heller* (2008).
[664] Ibid.

already existed at the state level. The list, however, was not comprehensive, indicating that the courts would need to consider the constitutionality of state regulations in the future.[665]

Challenging the Majority

Justices Stevens, Souter, Ginsburg, and Breyer (who issued a separate response) dissented, arguing that the Second Amendment protected a collective right to keep and bear arms. Justice Stevens' argument, similar to Justice Scalia's, focused on historical evidence to make an originalist argument, but reached a different conclusion. Justice Stevens did not disagree with the majority ruling that the Second Amendment guaranteed an individual right to keep and bear arms (it "protects a right that can be enforced by individuals") but took issue with the scope of that right. Justice Stevens argued that neither the text of the Amendment nor its contextual background should allow for "limiting any legislature's authority to regulate private civilian use of firearms" or that the Framers "intended to enshrine the common-law right of self-defense in the Constitution." The legal history of the Second Amendment supported this interpretation, though the majority analysis of *Miller* was misguided: *Miller* sought to protect "the right to keep and bear arms for certain military purposes," not to "curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons." Thus Justice Stevens articulated an "individual militia right" – the Second Amendment established the individual right to keep and bear arms for "certain military purposes" while serving in the militia – implying that the states were the arbiters of militia service. Further, Stevens was critical of the majority overturning decades of precedent that interpreted the Second Amendment as protecting a collective right of the states to arm their militias.[666]

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[665] *District of Columbia v. Heller* (2008).

[666] Ibid. Following the Sandy Hook tragedy in 2012, Justice Stevens restated his position while clarifying what he considered the strengths of the majority opinion, arguing that "the Second Amendment provides no obstacle to

Justice Breyer also dissented, applying an "interest balancing inquiry" to determine the nature and scope of the right to keep and bear arms. Justice Breyer agreed with Justice Stevens that the Second Amendment protected the use of firearms only in connection to militia service. But he played devil's advocate: even if the majority interpretation was correct – the Second Amendment guaranteed the individual right to armed self-defense – the D.C. handgun ban was still constitutional. Justice Breyer went on to discuss the appropriate level of scrutiny Second Amendment challenges should receive and how to balance "the interests protected by the Second Amendment on one side and public safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter." The statute in question should be evaluated in terms of how it furthered the interests of the government's pursuit of public safety, how this purpose would affect the protections provided to citizens by the Second Amendment, and whether there was a less burdensome regulatory scheme to balance both sets of interests. According to this rationale, the D.C handgun ban was constitutional because it addressed a legitimate public safely concern; the law did not interfere with the Second Amendment's protection of a well-regulated militia and only burdened the interest of self-defense "to some degree"; and there was no reasonable alternative to combat the problem of rampant handgun crime. Justice Breyer also warned that future litigation was

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regulations prohibiting the ownership or use of the sorts of weapons used in the tragic multiple killings in Virginia, Colorado and Arizona in recent years. The failure of Congress to take any action to minimize the risk of similar tragedies in the future cannot be blamed on the court's decision in *Heller*." Further, Justice Scalia was correct to limit the Court's ruling to both the type of weapon and method utilized for self-defense, meaning that "prohibitions on carrying concealed weapons, or on the possession of firearms by felons and the mentally ill, and laws forbidding the carrying of firearms in sensitive places such as schools and government buildings or imposing conditions and qualifications on the commercial sale of arms are specifically identified as permissible regulations." See Justice John Paul Stevens, "The Five Extra Words That Can Fix the Second Amendment," *Washington Post* (Washington, D.C.), 11 April 2014, adapted from John Paul Stevens, *Six Amendments: How and Why We Should Change the Constitution* (New York, NY: Little, Brown and Company, 2014).

inevitable: the *Heller* opinion would "encourage legal challenges to gun regulations throughout the Nation," though he qualified that gun regulation was best handled by elected legislators and the courts should be reluctant to interfere.[667]

Realigning the Politics of Gun Rights

Despite the highly politicized nature of the decision, *Heller* did not radically alter the way the courts interpreted gun legislation. Following the ruling, hundreds of cases were filed challenging state and local gun laws (including *McDonald v. Chicago* by one of Dick Heller's lawyers).[668] It was widely accepted that the Second Amendment protected the individual right to keep and bear arms within a private home, but the list of regulations considered legitimate included almost every current gun law. For the most part, the courts applied intermediate scrutiny to gun law challenges, largely upholding existing regulations because, while there was now a constitutional right for individuals to keep and bear arms, this right was not unlimited; to date, most gun laws – other than outright bans on firearms – have been deemed constitutionally permissible. Still, one of the most pressing issues left open in *Heller* was the scope of the individual right to keep and bear arms beyond the confines of one's home.[669] Further, because *Heller* dealt with a federal statute, it was unclear if its holding applied to the states.

While *Heller* appeared to be a clear win for the gun rights movement, it did not end the political debate about firearms and the scope of gun control, with many states working within the parameters of *Heller* to tighten their existing gun laws – while others eased their firearms regulations. The political impact of *Heller* was to solidify guns rights as a distinctly conservative

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[667] *District of Columbia v. Heller* (2008).
[668] Robert Barnes, "Cases Piling up Seeking Supreme Court's Clarification of Second Amendment Rights," *Washington Post* (Washington, D.C.), 15 August 2011, A15; and "Post-Heller Litigation Summary," Law Center to Prevent Gun Violence (http://smartgunlaws.org/category/second amendment), 2015.
[669] Bill Mears, "Analysis: Guns and the Law; Recent Ruling Highlights Legal and Personal Stakes," www.cnn.com/2012/12/17/us/gun-law-court-ruling/index.html, 17 December 2012.

issue, arming Republicans with the constitutional justification to expand gun rights, including "shall issue" licensing laws, open carriage laws, and loosening bans on assault weapons. Previously, the parties had adopted a conciliatory tone on gun control in their party platforms, suggesting that while they fundamentally disagreed on the scope of the right to bear arms, they were willing to work across party lines to achieve effective legislation. For example, the Democrat Party Platform of 1968 pledged they would "promote the passage and enforcement of effective federal, state, and local gun control legislation"[670] and Republicans vowed to support "the right of responsible citizens to collect, own, and use firearms for legitimate purpose" while limiting the "indiscriminate availability of firearms."[671] Now, the tone was decidedly more contentious. According to the Republicans:

> We uphold the right of individuals to keep and bear arms, a right which antedated the Constitution and was solemnly confirmed by the Second Amendment…this right also includes the right to obtain and store ammunition without registration. We support the fundamental right to self-defense wherever a law-abiding citizen has a legal right to be, and we support federal legislation that would expand the exercise of that right by allowing those with state-issued carry permits to carry firearms in any state that issues such permits for its own residents. Gun ownership is responsible citizenship, enabling Americans to defend their homes and communities. We condemn frivolous lawsuits against gun manufacturers and oppose federal licensing or registration for law-abiding gun owners. We oppose legislation that is intended to restrict our Second Amendment rights by limiting the capacity of clips or magazines or otherwise restoring the ill-considered Clinton gun ban.[672]

The lengthy political and legal commentary following *Heller* fell along divisive partisan lines, with liberals maintaining the collectivist interpretation while conservatives favored the

[670] Democratic National Convention, *Democratic Party Platform* (Chicago, IL: Democratic National Convention), 26 August 1968.
[671] Republican National Convention, *Republican Party Platform* (Miami Beach, FL: Republican National Convention), 5 August 1968.
[672] Republican National Convention, *Republican Party Platform* (Tampa, FL: Republican National Convention), 27 August 2012.

individualist interpretation.[673] Liberals tended to disagree with the decision and feared it would negatively impact gun regulation while conservatives largely supported the ruling – a political irony, given that conservatives often criticize judicial activism, of which Justice Scalia was widely accused of indulging in by articulating an originalist justification for the individual right to keep and bear arms. For example, appellate judge J. Harvie Wilkinson III opined that Justice Scalia was guilty of "an absence of a commitment to textualism; a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation; a failure to respect legislative judgements; and a rejection of the principles of federalism."[674] Still, despite such criticism, the public reaction to *Heller* was largely favorable: a Gallup Poll conducted during oral arguments found that 73% of those polled supported an individualist interpretation of the right to bear arms, a statistic that held steady following the verdict.[675]

The Question of Incorporation

The most pressing issue left open in *Heller* was the question of incorporation: did *Heller*'s ruling that the Second Amendment protected an individual right to keep and bear arms apply to the states, and if so, how would this legal shift affect the debate about gun rights in American politics? Since the 1930s, the fundamental civil liberties protected in the Bill of Rights – the freedom of speech, press, religion, unlawful searches and seizures, the right to council, and protection from double jeopardy – were systematically applied to the states by the Supreme Court through the Due Process and Equal Protection clauses of the Fourteenth

[673] See CNN/ORC International Poll (https://i2.cdn.turner.com/cnn/2015/images/10/21/rel11d.-.obama,.isis,.gun.control.pdf), 21 October 2015; and "Gun Rights vs. Gun Control," Pew Research Center (Washington, D.C.), 13 August 2015.
[674] J. Harvie Wilkinson III, "Of Guns, Abortions, and the Unraveling Rule of Law," in Saul Cornell and Nathan Kozuskanich, eds., *The Second Amendment on Trial* (Amherst, MA: University of Massachusetts Press, 2013), 189-190.
[675] Megan Brenan, "Support for Stricter U.S. Gun Laws at Lowest since 2016," *Gallup*, 16 November 2020; and Jeffery M. Jones, "Public Believes Americans Have Right to Own Guns," *Gallup*, 27 March, 2008.

Amendment: "No state shall…deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." The Second Amendment, however, was not included in the historical process of incorporation.

When the Founders created the Bill of Rights, they were not unduly concerned with the problem of state tyranny; rather, the states were the ultimate protector against federal encroachment. The state militias, armed and ready to defend the states, would protect their people from despotism. James Madison wrote in *Federalist 46*:

> Ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.[676]

Chief Justice John Marshall would later codify this position in *Barron v. Baltimore* (1833), which held that the Bill of Rights did not apply to the states. The Court ruled that "these amendments demanded security against the apprehended encroachments of the general government – not against those of the local governments."[677] State aggression against the federal government that resulted in the Civil War, however, changed the balance of federalism established by the Framers: now, the states, rather than the federal government, were viewed as a source of tyranny. The "Reconstruction Amendments" were deemed necessary to protect individuals from states infringing upon their rights and shifted the traditional language of the Bill of Rights (that limited Congress) to prohibit the states from denying individual rights. The right to bear arms was not a main factor in drafting these amendments, but armed violence in the South was a considerable problem. Violence against northerners, former Union soldiers, and

[676] James Madison, "Federalist 46," in George W. Carey and James McClellan, eds., *The Federalist* (Indianapolis, IN: Liberty Fund, 2001), 246.
[677] *Barron v. Baltimore* (1833).

newly freed slaves included physical threats to persons and property, as well as the denial of fundamental political rights, such as the freedom of assembly and the right to vote. Often these offenses were conducted by armed mobs: in a 1865 letter to Ohio Senator John Sherman, a concerned citizen worried that "Northern men have been subjected to the Gun knife the pistol the rope & tar & feathers for opinion's sake all over the South."[678]

The History of Incorporation

Citizens' "privileges and immunities" were already protected under the Constitution in Article IV, section 2, which ensured that "The Citizens of each State shall be entitled to all Privileges and Immunities of the Citizens in the several States." This clause required reciprocity between the states in respecting the laws of each; further, it suggested that the states, rather than the federal government, would define the rights of its citizens. Justice Bushrod Washington interpreted the Privileges and Immunities Clause in 1823, describing privileges and immunities as "fundamental rights" that included "protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government must justly prescribe for the general good of the whole."[679] The Privileges and Immunities Clause was problematic, however, in that it did not define the "Citizens of each State," meaning that certain groups of people (notably black men) could be excluded at the state's discretion.

The Fourteenth Amendment, read in conjunction with the Thirteenth (which abolished slavery) and the Fifteenth (which guaranteed the right to vote regardless of "race, color, or previous condition of servitude"), constituted a new scheme of individual rights following the

[678] Letter from M. Stone to John Sherman, 27 December 1865 in *John Sherman Papers* (Library of Congress, Washington, D.C.)
[679] *Corfield v. Coryell* 6 F. Cas. 546 (1823).

Civil War. Abolishing slavery was the most crucial step to securing the rights of former slaves, but the Constitution also needed to define those rights and protect personal liberty from threat, as there was little point in abolishing slavery if the states could still deny Freedmen their constitutional rights. In what would become the cornerstone to incorporating the Bill of Rights against the states, the Fourteenth Amendment formalized birthright citizenship and equality before the law. Further, it established the parameters of voting and holding office, qualifications regarding the national debt, and granted Congress the authority to enforce the provisions of the amendment. While these amendments were intended to protect the rights of newly freed slaves, they also profoundly shifted the locus of political power from the states to the federal government. The amendments referred to specific individual rights – the protection of privileges and immunities, due process, equal protection, and the right to vote – but did not specify how these rights would be secured, inviting further action from Congress and interpretation by the federal courts. (Congress was already considering similar issues, working concurrently on legislation that would become the Civil Rights Act of 1866.)[680]

The Fourteenth Amendment

The Fourteenth Amendment, the longest amendment to the Constitution, was the result of lengthy discussion of the Joint Committee on Reconstruction in 1866. Votes on the various proposals were reported, but unfortunately there is little record of the debate surrounding each issue.[681] The final amendment included five sections. The first section, considered the core of the amendment, defined citizenship as "all persons born or naturalized in the United States, and

[680] For a detailed account of the Reconstruction Amendments, see Eric Foner, *A Short History of Reconstruction* (New York, NY: Harper Perennial Modern Classics, 2015); Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York, NY: W.W. Norton, 2020); and Richard White, *The Republic for Which It Stands* (New York, NY: Oxford University Press, 2017).
[681] Benjamin B. Kendrick, ed., *The Journal of the Joint Committee of Fifteen on Reconstruction* (New York, NY: Columbia University Press, 1914).

subject to the jurisdiction thereof," who were citizens of both the United States and the state in which they lived. Further, and most relevant to balance of state and federal power, the states were prohibited from denying citizens of their rights:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[682]

There is little record of what Congress considered the specific "privileges or immunities" of citizens. Michigan Senator Jacob Howard referred to Justice Washington's opinion in *Corfield v. Coryell* as a basis for enumerating specific rights, to which "should be added the personal rights guaranteed by the first eight amendments…the great object of the first section of the [Fourteenth] amendment is, therefore, to restrain the power of the states and compel them at all times to respect these great fundamental guarantees."[683] The Civil Rights Act of 1866 would further enumerate the specific civil rights protected by the Fourteenth Amendment, including the ability to make contracts, equal access to the courts, and the protection of property – rights that were guaranteed to all citizens "of every race and color."[684] The assurance to all citizens of "the equal protection of the laws" codified the notion of equality, a familiar and cherished political principle from the Declaration of Independence now formalized in the Constitution by the Fourteenth Amendment: laws must not only apply to citizens equally, but be administered without discrimination against specific groups.

The second section of the Fourteenth Amendment articulated voting requirements; the states retained control over voting practices as guaranteed under Article I, section 4 of the

[682] The Fourteenth Amendment to the United States Constitution (1868).
[683] *Congressional Globe*, First Session of the 39th Congress (23 May 1866).
[684] The Civil Rights Act of 1866.

Constitution but would now be penalized if representation was "denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime." The third section was the most time-specific: it limited the political influence of southern states by declaring that any person who had previously taken an oath to support the Constitution of the United States – but then "engaged in insurrection or rebellion against the same" – was barred from holding office in both the federal and state governments. The fourth section followed suit in addressing particular post-war concerns by prohibiting both the state and federal governments from assuming Confederate debt and denying slaves owners compensation their "property." Finally, the last section granted Congress the power to enact "appropriate legislation" to formalize the precise nature of the rights established under the Fourteenth Amendment and to guarantee that the states did not deny citizens of these rights.[685]

The Fourteenth Amendment was both a product of its time – a response to the specific challenges of rebuilding the nation following the Civil War by limiting the political influence of former Confederate states – but also a new statement about the nature of citizenship, rights, and equality in America. In sum, the Fourteenth Amendment created a novel definition of citizenship that linked the American people directly to the federal government rather than to their state. Previously, the Constitution secured citizens' privileges and immunities, due process, and equal protection under the law; now, these rights were protected by the federal government and would eventually be guaranteed, along with the other fundamental liberties established by the Bill of Rights, to individuals from encroachment from state and local governments through the process of incorporation.

[685] The Fourteenth Amendment to the United States Constitution (1868).

Incorporating the Bill of Rights

Initially, the Supreme Court was concerned with interpreting the Fourteenth Amendment in terms of practical application – the state of the nation following Reconstruction – but also in relation to federalism: how would the Reconstruction Amendments be enforced by both federal and state governments? At first, the courts primarily considered the rights of corporations under the Fourteenth Amendment, often overturning state laws that violated the freedom of contract protected by the Due Process Clause. Regarding the Privileges or Immunities Clause, the Supreme Court ruled in 1873 that the Fourteenth Amendment pertained only to federal citizenship, not state citizenship, and could not be utilized to overturn state laws. Justice Samuel J. Miller's opinion in the *Slaughter-House Cases* defined privileges and immunities as a limited set of rights:

> Such a construction [of the Privileges or Immunities Clause] followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment… We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.[686]

Following this narrow reading of the Fourteenth Amendment, however, the Supreme Court went on to systematically "incorporate" key provisions of the Bill of Rights against the states beginning in the 1920s. There were some arguments for total incorporation, most forcefully made by Justice Hugo Black in his 1947 dissent in *Adamson v. California* (1947), claiming that under the Fourteenth Amendment, the rights and liberties granted by the Bill of Rights should apply to both the states and the federal government. Justice Felix Frankfurter disagreed,

[686] *Slaughter-House Cases* 83 U.S. 36 (1873).

concurring with the majority opinion that the states were merely bound by "fundamental fairness."[687] Justice Black's position remained an outlier and over time, the Supreme Court began the process of "select incorporation," applying the Fourteenth Amendment case-by-case to the states to determine which sections of the Bill of Rights applied to their laws. [688]

The sections that have not been incorporated remained so because the rights articulated were not deemed necessary – they either already applied to the states or were not essential to assuring due process. For example, the Tenth Amendment reads: "The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," which renders incorporation redundant. This rationale explains, in part, why the Second Amendment was not incorporated until 2010. Because the text referred directly to the states and guaranteed their right to arm their militias, it could be assumed that the Second Amendment already applied to the states. Also, since most state constitutions included provisions that protected the right to bear arms (often more sweeping in scope than the Second Amendment), incorporation would be unnecessary. Further, if the federalization of the state militias removed the states' right to keep and bear arms for the common defense, there would be no issue regarding due process.[689] Finally, the Supreme Court may have avoided addressing the

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[687] *Adamson v. California* (1947). Justice Black later wrote an article advancing the argument for total incorporation, which mentioned the Second Amendment: "Although the Supreme Court has held this Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute." See Hugo Black, "The Bill of Rights," *New York University Law Review* 35 (1960): 865-881.

[688] For a full account of the Fourteenth Amendment and the process of incorporation, see Henry J. Abraham, *Freedom and the Court: Civil Rights and Liberties in the United States*, 8th edition (Lawrence, KS: University of Kansas Press, 1972); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 2000); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986); Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (New York, NY: Cambridge University Press, 2014); and William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, MA: Harvard University Press, 1988).

[689] For example, the Supreme Court dismissed a New Jersey Second Amendment appeal "for want of a substantial federal question." See *Burton v. Sills* 394 U.S. 812 (1969).

question of incorporation because the legal precedent establishing the Second Amendment as a collective right presented a paradox: how could a right meant protect the states be incorporated against them?[690] Once *Heller* established the individual right to keep and bear arms independent of militia service, however, these issues could be resolved.[691]

Incorporation and the Politics of Gun Rights

Prior to *McDonald v. Chicago* (2010), discussion of incorporating the Second Amendment against the states was scant except for a handful of legal scholars advocating the individualist interpretation of the Second Amendment, most notably Stephen P. Halbrook and Akhil Reed Amar. Halbrook argued the Fourteenth Amendment established a constitutional right to keep and bear arms for individual self-defense outside of militia duty, using congressional debates regarding the Reconstruction Amendments to justify his claim. For example, Senator Jacob Howard in 1866 "referred to 'the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press…*the right to keep and bear arms*…'"[692] Halbrook equated a "personal right" with an "individual right" to suggest that Howard meant the entire Bill of Rights should be incorporated against the states. Halbrook also understood the Fourteenth Amendment to be aligned with the Freedman's Bureau Act of 1866 and the Civil Rights Act of 1866, concluding that these acts

[690] The Eighth Circuit ruled in 1992 that since the Second Amendment had never been incorporated, it did not apply to the states or their gun laws. See *Fresno Rifle and Pistol Club v. Van De Kamp* 965 F.2d 723, 8th Circuit (1992).
[691] To date, the Supreme Court has incorporated most of the Bill of Rights. Following *McDonald v. Chicago* (2010), the Court incorporated the Eighth Amendment's ban on excessive fines in *Timbs v. Indiana* (2019). For an overview on the remaining three non-incorporated rights – the Fifth Amendment's right to a grand jury; the Sixth Amendment's requirement of criminal jury unanimity; and the Seventh Amendment's guarantee of a civil jury – see Suja A. Thomas, "Nonincorporation: The Bill of Rights after *McDonald v. Chicago*," *Notre Dame Law Review* 88 (2012): 159-204.
[692] Stephen P. Halbrook, *That Every Man Be Armed* (Albuquerque, NM: University of New Mexico Press, 2013), 123.

secured "the rights of personal security and personal liberty [to] include the 'constitutional right to bear arms.'"[693] Since the Fourteenth Amendment protected personal security and liberty, "to the members of the Thirty-Ninth Congress, possession of arms was a fundamental, individual right worthy of protection from both federal and state violation."[694]

Legal scholar Akhil Reed Amar made a similar argument, claiming that under the Fourteenth Amendment, the Second Amendment should be extended to include the right of armed self-defense. Amar argued that following the Civil War, the right to bear arms became a political right, akin to other rights (such as the right to vote and freedom of speech) that were fundamental to all citizens within the political community. Amar presented a system of "refined incorporation" that made a distinction between those sections of the Bill of Rights that protect a "personal privilege" or the private right of individual citizens, which should be incorporated, and those of the "rights of the states or the public at large," which should not be incorporated. Amar acknowledged that the Second Amendment includes both private and public rights, but prioritizes private rights, particularly the right of armed self-defense. If any section of the Bill of Rights protects a "personal privilege – that is, a private right – of individual citizens," than the Fourteenth Amendment prohibits the states from infringing upon this right; for Amar, that includes the right to keep and bear arms.[695] Despite these outliers, however, the issue of incorporating the Second Amendment against the states was largely overlooked by both the courts and the academy until 2010.

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[693] Stephen P. Halbrook, *Freedman, the Fourteenth Amendment, and the Right to Bear Arms*, 1866-1876 (Westport, CT: Praeger, 1998), viii.
[694] Ibid., 43. See also Stephen P. Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," *George Mason Law Review* 4 (1981): 1-69.
[695] Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," *Yale Law Journal* 101 (1992): 1193-1284.

McDonald v. Chicago (2010)

Prior to *Heller*, the Supreme Court maintained that the Second Amendment protected the right to bear arms under the auspices of government-regulated militia activity, established in *United States v. Cruikshank* (1876); *Presser v. Illinois* (1886); *Miller v. Texas* (1894); and *United States v. Miller* (1939). Lower appeals courts had the opportunity to incorporate the Second Amendment but declined to do so; for example, the Ninth Circuit ruled in 1996: "We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen."[696] Following *Heller*'s ruling that the Second Amendment protected the individual right to keep and bear arms for personal self-defense, however, the Court needed to address the questions of whether state or local governments could ban the possession of handguns, and if the Second Amendment applied to the states under the Fourteenth Amendment.

Otis McDonald (with fellow plaintiffs Adam Orlov, David and Colleen Lawson, the Second Amendment Foundation, and the Illinois State Rifle Association) argued that Chicago's ban on handguns violated the Second Amendment. Further, a state government could not deny an individual the right to keep and bear arms: since the federal government could not deny citizens their fundamental right to keep arms in a private home, it was unconstitutional for state governments to do so through their regulatory schemes. In response, the City of Chicago argued that the state should be allowed to regulate firearms in response to local circumstances. Chicago and Oak Park's gun laws were highly restrictive; similar to Washington, D.C.'s handgun ban, they prohibited the possession of handguns as well as the registration of most handguns – while making it a crime to possess an unregistered handgun. McDonald and his fellow petitioners filed

[696] *Hickman v. Block* 81 F.3d 98; 9th Circuit (1996).

a lawsuit against the Northern District of Illinois the day after *Heller* was decided. McDonald, a retired building maintenance engineer, sought to purchase a handgun for personal self-defense given the rise of crime in his neighborhood.[697] After the district court dismissed the case, McDonald appealed to the Seventh Circuit, which upheld the district court's position. The court made three arguments: first, *Heller* dealt with federal legislation rather than state or local laws; second, the Supreme Court had refused to incorporate the Second Amendment against the states in the past; finally, it was the Supreme Court's role to determine if the Second Amendment should be incorporated against the states, not a federal appeals court.[698]

Making the Case: The Due Process Clause

The legal task of incorporating the Second Amendment against the states depended on which section of the Fourteenth Amendment was applied, either the Privileges or Immunities Clause or the Due Process Clause; in his earlier appeal, McDonald's lawyers outlined incorporation under both scenarios. The Privileges or Immunities Clause was designed to protect those privileges and immunities necessary to American citizenship and to secure full participation in the political process, an argument that revisited conditions following the Civil War that led to the passage of the Fourteenth Amendment, when newly freed slaves were denied their rights as citizens. For McDonald's lawyers, "privileges and immunities" indicated two sets of rights: those fundamental rights protected by the Privileges and Immunities Clause in the

[697]Adam Liptak, "Justices Will Weigh Challenges to Gun Laws," *New York Times* (New York, NY), 30 September 2009; Mark Sherman, "Ban Handguns? Supreme Court Taking a New Look," *Associated Press*, 30 September 2009; and Jennifer Tanaka, "On Otis McDonald and His Lawsuit Challenging Chicago's 1982 Handgun Ban," https://www.chicagomag.com/Chicago-Magazine/January-2010/In-Their-Sights-Lawsuit-challenging-Chicagos-1982-handgun-ban-to-be-heard-by-Supreme-Court.

[698] *National Rifle Association of America, Inc. v. City of Chicago* IL 567 F.3d, Seventh Circuit (2009).

Constitution (Article IV, section 2) and those enumerated rights established in the Bill of Rights, including the right to keep and bear arms.

McDonald's lawyers were aware, however, that incorporation of the Bill of Rights had been more successful under the Due Process Clause. The Court held in the *Slaughter-House Cases* (1872) that the Privileges or Immunities Clause of the Fourteenth Amendment included only those rights that "are dependent upon citizenship of the United States, and not citizenship of a State," which included the fundamental rights established in the Constitution, but not the enumerated rights in the Bill of Rights. Further, *United States v. Cruikshank* (1876) held that the Second Amendment did not apply to the states; later, *Presser v. Illinois* (1886) established that the right to keep and bear arms was not a privilege or immunity of citizenship. Given the precedent, it seemed unlikely that the argument – the right to keep and bear arms was a privilege or immunity necessary to citizenship and full participation in the political process – would succeed.[699] For a right to be incorporated under the Due Process Clause, however, it must be "fundamental to our scheme of ordered liberty" and "deeply rooted this Nation's history and tradition." (These parameters were established in *Duncan v. Louisiana* (1968), which considered whether the demand for a trial by jury was a "right among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.") In other words, were the protections guaranteed by the Second Amendment – now understood as an individual right to keep and bear arms for personal self-defense – fundamental and necessary to a scheme of ordered liberty? This concept could apply to both sides of the debate regarding Chicago's gun laws: on one hand, Chicago's ban on handguns was a necessary safety measure to secure ordered

[699] *National Rifle Association of America, Inc. v. City of Chicago* IL 567 F.3d, Seventh Circuit (2009).

liberty; on the other, it was unduly restrictive, preventing law-abiding citizens from protecting themselves from threat, and violated both the Second and the Fourteenth Amendments.

McDonald argued that the right to bear arms was a fundamental right necessary to personal liberty and historically recognized by the states in their constitutions; the Second Amendment protected the individual right to self-defense; and it was not constitutionally permissible that the states curtail this right. The City of Chicago, however, countered that incorporating the Second Amendment against the states would limit their ability to regulate weapons in densely populated areas with high crime rates, and would allow the federal courts too much authority over local matters.[700] At the heart of the debate was the central question pertinent to all incorporation cases: should the broader concerns of federalism trump the protection of individual rights? This question was especially salient to the Second Amendment because the states had historically been deeply involved in, and largely independent from, the federal government in regulating firearms.

The Supreme Court reversed the lower court's ruling, claiming that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty" and that the Due Process Clause incorporated the Second Amendment against the states. To justify their position, the Court reiterated *Heller*'s holding that the individual right to armed self-defense was a "central component" of the Second Amendment and "deeply rooted in this Nation's history and tradition." The Court revisited the historical analysis done in *Heller*, which emphasized the fear of disarmament by a tyrannical federal government. Further, the Court considered the background of the Fourteenth Amendment, particularly the congressional debate in which

[700] *McDonald v. City of Chicago* (2010).

senators claimed the right to keep and bear arms was a "fundamental right deserving of protection."[701] Writing for the majority, Justice Samuel Alito argued that those rights – including the right to keep and bear arms – that are "fundamental to the Nation's scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition" applied to the states through the Fourteenth Amendment. In considering whether the right to bear arms met these criteria, the Court was unequivocal: "*Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the *Heller* Court held that individual self-defense is 'the central component' of the Second Amendment right."[702] Therefore Chicago's ban on handguns was unconstitutional because it violated the individual right to keep and bear arms for personal self-defense and applied to the state of Illinois under the Due Process Clause of the Fourteenth Amendment. Justices Roberts and Scalia concurred, as well as Justice Thomas, though he argued that the Second Amendment should be incorporated under the Privileges or Immunities Clause because "the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship."[703]

Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented, as well as Justice Stevens. According to Justice Breyer, "Nothing in the Second Amendment's text, history, or underlying rationale…warrant[s] characterizing it as 'fundamental' insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes."[704] Further, doing so would

[701] *McDonald v. City of Chicago* (2010).
[702] Ibid.
[703] Ibid.
[704] Justice Breyer firmly disagreed with the historical account of the Second Amendment in *Heller*, noting that "the Court based its conclusions almost exclusively upon its reading of history. But the relevant history in *Heller* was far from clear: Four dissenting Justices disagreed with the majority's historical analysis. And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history."

weaken the government's ability to regulate firearms: the Constitution provided no justification for "transferring ultimate regulatory authority over the private use of firearms from democratically elected legislators to courts of from the States to the Federal Government."[705] Justice Stevens' separate dissent used rationale similar to his argument in *Heller* and focused less on the right to bear arms but on the broader interests of federalism: the Second Amendment could not be applied to the states because it was intended to protect the interests of the states against the federal government; it was "directed at preserving the autonomy of the sovereign States, and its logic therefor resists incorporation by a federal court *against* the states."[706] Justice Stevens also warned that there would be "a tsunami of legal uncertainty, thus litigation" regarding the permissibility of state gun laws.

A Subtle Force

While *Heller* received widespread public attention, *McDonald* garnered a quiet response. Legal scholars Saul Cornell and Nathan Kozuskanich observed following the decision:

> Compared to *Heller*, the argument in *McDonald* is unremarkable. Although historians would likely quibble with the history presented by the majority in *McDonald*, the notion that incorporation logically follows from *Heller* is hard to dispute as a matter of existing legal doctrine.[707]

In other words, if *Heller* established an individual right (setting aside the question of historical accuracy), then based on the Court's pattern of incorporating the Bill of Rights against the states, it would follow that the Second Amendment should be incorporated against the states. Still, gun rights advocates worried that *McDonald* was not sufficiently compelling to legally entrench the

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[705] *McDonald v. City of Chicago* (2010).
[706] Ibid.
[707] Saul Cornell and Nathan Kozuskanich, "The D.C. Gun Case," in Cornell and Kozuskanich, eds., *The Second Amendment on Trial* (Amherst, MA: University of Massachusetts Press, 2013), 19. For further commentary on *McDonald*, see Symposium, "Firearms, Inc., or, A Collection of Essays and Articles Discussing *McDonald v. City of Chicago*, the Second Amendment, Its Contours in Light of *District of Columbia v. Heller*, and its Possible Incorporation through the Fourteenth Amendment," *Cardoza Law Review De Novo* (2010): 1-202.

individualist interpretation. Lawyer Alan Gura (who represented Dick Heller) commented with distain that the courts favored "Justice Breyer's sentiments about Second Amendment claims far more than those of Justice Scalia" and that many of the lower courts "have simply not reconciled themselves to *Heller* and *McDonald*, and can be counted upon to resist rather than implement these decisions."[708]

Addressing Legal Challenges to Gun Control

The Supreme Court asserted in *Heller* and *McDonald* that the Second Amendment guaranteed an individual right for law-abiding citizens to keep and bear arms for personal self-defense within the home and incorporated this right against the states. The lower federal courts, however, were left to address the numerous challenges to firearms regulations that followed, a daunting task because *Heller* neither defined the full scope of the Second Amendment nor offered a standard of review for judging future Second Amendment claims. [709] The Fourth Circuit wrote in 2011:

> The upshot [of *Heller* and *McDonald*] is that there now exists a clearly defined fundamental right to possess firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by government regulation.[710]

The courts needed to balance the individual right now enshrined in the Second Amendment with the interests – presumably public safety, but also political motivations – behind existing firearms regulations, particularly those pertaining to carrying weapons outside of the home and which weapons were considered dangerous or unusual, neither of which *Heller* addressed.

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[708] Alan Gura, "The Second Amendment as a Normal Right," *Harvard Law Review* 127 (2014): 703, 707.
[709] By 2013, lower courts were tasked with addressing more than six hundred challenges to existing gun laws. See "Post-Heller Litigation Summary," Giffords Law Center to Prevent Gun Violence (http://smartgunlaws.org/category/second-amendment), 2017.
[710] *U.S. v. Masciandaro*, 638 F.3d 458, Fourth Circuit (2011).

To evaluate these laws, the courts needed to determine the appropriate level of scrutiny: if the law in question was an egregious infringement on Second Amendment protections, then the court would "consider the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[711] In other words, the courts had to decide if the regulation in question impeded upon a core Second Amendment protection, which, post-*Heller*, included not just arms-bearing for militia service, but bearing arms for self-defense within the home. For example, the Fourth Circuit made the distinction in *United States v. Masciandaro* (2011) between strict and intermediate scrutiny in judging different gun laws, in this case considering weapons in a private home versus firearms outside the domestic sphere:

> We assume that any law that would burden the "fundamental" core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.[712]

While many lower courts have adopted similar logic, the post-*Heller* legal environment remains unsettled as the courts grabble with who can legally possess guns and which categories of weapons require more restrictive regulation. Challenges to federal, state, and local firearms regulations focus on issues concerning age regulations, citizenship status, felons, and those with histories of domestic abuse and drug crimes. Further, state and local governments continue to test the legal permissibility of state licensing procedures, assault weapon bans, and carriage laws. For example, New York's ban on the transportation of licensed handguns outside of the home was challenged on Second Amendment grounds in 2019; the Supreme Court agreed to hear the case, but New York amended its law prior to the hearing. The case was declared moot, though

[711] *Kolbe v. Hogan* 813 F.3d, Fourth Circuit (2016). See also *Powell v. Tompkins* 783 F.3 332, First Circuit (2015) and *New York State Rifle & Pistol Association v. Cuomo*, 804 F.3d. Second Circuit (2015).
[712] *United States v. Masciandaro* 638 F.3d, Fourth Circuit (2011).

Justices Alito, Gorsuch, and Thomas dissented, arguing that the law in question was a violation of the Second Amendment and the lower courts had been too narrow in their application of *Heller*. Justice Kavanaugh also recommended that the Supreme Court revisit the scope of Second Amendment rights: "The Court should address that issue [the correct application of *Heller*] soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court."[713] The Court is poised to do just that, agreeing in 2021 to hear *New York State Rifle & Pistol Association, Inc. v. Corlett*, which challenges the New York law requiring those seeking a license to carry a weapon outside of the home to show "proper cause," giving the Court the opportunity to clarify the scope of the Second Amendment and how to determine which laws are constitutionally permissible.[714] (Ruling in June 2022, the Court overturned New York's handgun's law, arguing that the Second Amendment guarantees the broad right to carry a handgun outside of the home, thus expanding the parameters of the right to bear arms to include a sweeping right to self-defense. Further, the requirement to show proper cause was antithetical to the Bill of Rights, as there is "no other constitutional right that an individual may exercise only after demonstrating to government officers some special need.")[715]

Gun Rights in Current American Politics

While the ruling in *Heller* is unequivocal in its guarantee that the Second Amendment protects the individual right to keep and bear arms, balancing the question of gun rights with gun control remains a highly contentious political and legal issue.[716] Further, the role of the states in regulating firearms remains unclear: what role, if any, is constitutionally permissible for the

[713] *New York State Rifle & Pistol Association, Inc. v. City of New York* (2020).
[714] Ariane de Vogue and Devan Cole, "Supreme Court Agrees to Take Up Major Second Amendment Case," https://www.cnn.com/2021/04/26/politics/supreme-court-second-amendment-case/index.html, 26 April 2021.
[715] *New York State Rifle & Pistol Association, Inc. v Bruen* (2022).
[716] E.J. Dionne, Jr. "Originalism Goes Out the Window," *Washington Post* (Washington, D.C.), 27 June 2008.

states when the Second Amendment has been incorporated against them? It might be fair to assume a simple answer – the states are prohibited from limiting the individual right to keep and bear arms – but that has not necessarily been the case following *Heller*, nor should it be. There is a long tradition of local and state authority over the regulation of rights, particularly when public safety is a concern, a practice which continues despite the preeminence of the federal government. Implicit to the Fourteenth Amendment and the subsequent incorporation of the Bill of Rights against the states is that the states will actively deny citizens their rights. While that has been true at certain times over the course of American politics, this assumption cannot be taken for granted, especially in the case of the right to keep and bear arms. The states must be empowered to regulate firearms according to their own interests, which does not necessarily mean limiting individual rights: while some states have adopted highly restrictive gun regulations following *Heller*, others have granted wide latitude to gun owners. Restoring Second Amendment protections to the states is crucial to achieving a regulatory scheme that assures public safety, balances state and federal authority, and protects the rights of law-abiding gun owners.

Contrary to the Fourth Circuit's ruling in *U.S. v. Masciandaro*, the right to keep and bear arms is not a fundamental *individual* right – fundamental meaning essential to full participation in the political process. Perhaps at certain junctures in America's history it may have been: in the Colonial era, serving in one's local militia was a civic duty, thus bearing arms was necessary to fulfill that obligation; following the Civil War, bearing arms may have been necessary as a deterrent for newly freed slaves denied their political rights. In current times, however, there is no need for an individual citizen to be fully armed in order to vote, for example, or exercise other forms of political participation. If this were the case, the experiment of American government

would be in grave danger, which is why the words of Michigan Republican Mike Detmer are chilling. In January 2022, Detmer urged local voters to "show up armed" to the polls so Republicans could accurately count ballots; further, "the right to bear arms tells the government the citizenry is armed…if we can't change the tide, which I believe we can, we need to be prepared to lock and load." Detmer later claimed the Second Amendment guaranteed the right of the people to protect themselves from government tyranny – not a historically incorrect assessment – but stretched the parameters of the Second Amendment to include the "worst case…lock and load."[717] Such words not only encourage voter intimidation, but contradict even the oldest firearm regulations that prohibited weapons in public spaces such as government buildings and churches to prevent violent conflicts.[718] Further, implying that the right to keep and bear arms is a necessary condition to full political participation undermines the tradition of American politics in which dutiful citizens (often law-abiding gun owners) share in the peaceful turnover of power through fair elections, a treasured American value. If Americans need to "lock and load" in order to vote, the political integrity of entire system would be in jeopardy. The right to keep and bear arms is, however, a fundamental *states'* right: if the states are denied their right to regulate firearms, they would lack full authority to participate in the national debate about gun control, as well as to secure public safety under a scheme of well-regulated liberty. To protect the interests of both rights and federalism, then, the post-*Heller* political landscape must include a robust role for the states in balancing gun rights with effective gun legislation.

[717] Craig Mauger, "Show up Armed to Protect Election Observers, Michigan Candidate Suggests," *The Detroit News* (Detroit, MI), 31 January 2022.
[718] Consider, for example, the tragic Colfax Massacre of 1873, in which hundreds of Louisiana voters were killed in an armed protest over election results.

Conclusion:

Restoring the Second Amendment to the States

The issue of gun rights is one of the most contentious and polarizing debates in contemporary American politics. The right to bear arms means different things to different people, varying in intensity: for some, guns are a cherished symbol of personal freedom and liberty; for others, they represent violence and crime. There are sportsmen who keep and bear arms for hunting and recreation; others who vehemently oppose to all firearms; and some who are simply indifferent to guns and the political debate they provoke. Personal views on guns often reflect deeply held cultural beliefs about American political identity, with competing positions on gun rights aligning with broader political ideals, especially the protection of individual rights. As NRA board member Cleta Mitchell explained in 2013: "Obama famously referred to people who 'cling to guns and religion.' He was right. We do. And we are proud of it. This is about abiding principles, and people take action when they think someone or some group is taking away precious values."[719] The right to keep and bear arms established in the Second Amendment is invoked by both sides of the debate to make arguments for or against gun control, and is crucial to understanding not only how the issue of gun rights is debated and resolved in American politics, but also to the changing nature of individual rights and broader arrangements of federalism.

Separating Politics and Law

The courts have made clear that the Second Amendment protects the individual right to keep and bear arms for personal self-defense, but the political debate about gun rights remains a

[719] Quoted in Joel Achenbach, Scott Higham, and Sari Horwitz, "How NRA's True Believers Converted a Marksmanship Group into a Mighty Gun Lobby," *Washington Post* (Washington, DC), 12 January 2013.

divisive partisan issue, with the gun rights lobby undoubtedly one of the most powerful forces in American politics. The debate about guns is closely linked with constitutional law and how the Second Amendment is interpreted: while the text of the Second Amendment remains the same, its constitutional meaning has changed over time, and these interpretative shifts have altered the way opposing positions on gun rights and gun control are reconciled in American politics. Still, it is developments outside of the courts – including the evolution of the state militia system, the federalization of gun policy, and the rise of the gun rights movement – that help explain why the debate about gun rights is so contentious and offer perspective on achieving effective policy outcomes. In tracking the political development of the Second Amendment, analyzing its historical interpretations and identifying critical junctures when interpretative shifts have influenced the politics of gun rights, this dissertation argues that for the Second Amendment to retain its constitutional integrity, the states – rather than the federal government or individual citizens – should play a dominant role in determining the direction of gun legislation, deciding of their own accord whether to limit or expand gun rights. *Heller* and *McDonald* overturned decades of precedent that protected the states, asserting that the Second Amendment guaranteed an individual right to keep and bear arms for personal self-defense, a right that was later incorporated against the states. These rulings, however, did not settle the question of how competing claims of gun rights and gun control should be balanced in American politics.

Further, the debate about gun rights is underscored by broader concerns about federalism, another issue left unresolved following *McDonald*. Incorporating the Second Amendment against the states strengthened the role of the federal government in regulating gun rights and limited the states from legislating according to their own interests, but left unclear how the federal government and the states should balance authority. As well, demographic divides

(between and within states) on gun rights have only deepened, contributing to the political polarization over the issue of gun rights that is so prevalent in contemporary American politics. The Supreme Court was too quick to dismiss the issue of federalism in *Heller*: though Justice Stevens wrote in his dissent, "The ultimate purpose of the [Second] Amendment was to protect the States' share of the divided sovereignty created by the Constitution," the majority disagreed. According to Justice Scalia, "The Second Amendment right, protecting only individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia."[720] Restoring Second Amendment protection to the states, then, is crucial to achieving a regulatory scheme that both assures public safety and protects the individual right to keep and bear arms; further, allowing the states to regulate the right to bear arms reconciles competing interpretative claims through balanced regulation.

The previous chapters have demonstrated that the collectivist interpretation of the Second Amendment is the most historically valid; maintaining this position, however, which is at odds with prevailing political and legal claims, only matters if it can be expressed through definitive political action. To resolve this tension, the historical premise of the right to keep and bear arms – the states' right to arm their militia – must be protected and the states, not the federal government, should be at the forefront of shaping and implementing gun regulation. The states must play a robust role in regulating weapons, not just because the Second Amendment demands that they do so, but because federalizing gun regulation has dire consequences for the proper balance of state and federal authority. Limiting the states from regulating the right to keep and

[720] Ironically, it was Justice Scalia who staunchly defended federalism in another politically charged case, *Planned Parenthood of Southeast Pennsylvania v. Casey* (1992). Justice Scalia opined: "By foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish." This position was not upheld in *Heller*.

bear arms prevents the states from creating diverse gun laws; it allows the courts too much power over the direction of gun policy at the expense of state legislatures; and it ultimately denies the people of their individual rights.

The State of the Debate

Finding a compromise between the interests of gun rights and gun control, and how the federal government and the states should balance authority in regulating guns, remains a challenge in contemporary American politics. Shifting interpretations of the Second Amendment have aligned not only with the transformation of the politics of gun control, but with broader political trends, including the increased power of the federal government; the highly divisive nature of partisan politics; and the rise of judicial activism, which has resulted in the increasingly polarized debate about guns in America. There is a pattern that often emerges after violent gun incidents: following mass shootings, armed standoffs, encounters between police and unarmed civilians, and high profile gun crimes, there is a call for more stringent gun regulations as well as the increased enforcement of existing laws – which is then met by protest from gun rights activists, who denounce the violence but still demand the protection of gun rights. The Second Amendment is referenced by both sides to justify their position. Similar to other polarizing debates in contemporary American politics, however, most citizens maintain a relatively moderate position on guns; it is the more extreme voices on either side that garner the most attention.[721] Still, there is a clear divide between conservatives and liberals on gun rights as well as geographic and demographic divisions. In general, conservatives tend to support a robust individual right to keep and bear arms with minimal regulation while liberals defend the

[721] See Pew Research Center (https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns).

collectivist interpretation that favors more regulation; further, those residing in densely populated urban areas are more likely to favor stricter gun control measures than those living in rural regions. That said, the politics of gun rights is anything but straightforward, with political actors often taking unexpected positions. For example, conservatives who usually hold a narrow interpretation of individual rights and criticize judicial activism are willing to bend their principles when it comes to gun rights; liberals, on the other hand, often support expansive individual rights – with the exception of guns.[722]

The right to bear arms, once understood as a civic duty to serve in the local militia but now a constitutionally protected individual right, has joined other individual rights arguments in what political scientist Mary Ann Glendon describes as "rights talk." The debate about gun rights has followed the pattern of other individual rights claims, varying from measured discussions of reasonable regulation to heated disputes about the scope of individual rights in modern America. For Glendon, there is an "increasing tendency to speak of what is most important to us in terms of rights, and to frame nearly every social controversary as a clash of rights."[723] Discussing guns as an issue of rights rather than merely a regulatory or procedural concern gives gun owners increased legitimacy and connects guns with the fundamental principles of American government, namely the constitutional protections of individual liberty. Since arguments about rights tend to be vitriol, however, satisfactory political outcomes are challenging to obtain because such debate promotes "unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the

[722] For a comprehensive account of both sides of the political and legal debate, see "Symposium on the Second Amendment: Fresh Looks," *Chicago Kent Law Review* 1 (2000) and, more recently, "The Second Amendment's Next Chapter," *Northwestern University Law Review* 1 (2021).
[723] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, NY: Free Press, 1991), 4.

discovery of common ground."[724] Glendon's point is well taken in the context of the current debate about gun rights: to threaten an ardent gun supporter with the denial of Second Amendment rights – or to inform a staunch gun control advocate that the Second Amendment allows for the sweeping right for individuals to keep and bear arms for any purpose – will likely end in heated disagreement and political gridlock.

Thus effective policy outcomes are difficult to achieve because conflicting positions on guns tend to reflect deeply held beliefs about individual rights more generally. Legal scholar Erwin Chemerinsky argues that because there are strong arguments supporting both sides of the debate, determining a position is not the result of constitutional theory or political science methodologies, but the "product entirely of the values and politics of the individual." Chemerinsky claims that most positions on the Second Amendment are *a priori* and "each side, based on political ideology, has a position and each is defended based on all available materials."[725] Further:

> Society is obviously deeply divided over the issue of gun control and the meaning of the Second Amendment. There appears to be no bridge between the two sides. Those who oppose gun control espouse a romantic individualism where guns are part of individual freedom and the right of the people to protect themselves. Those who favor gun control stress the collective good and the harms gun cause to society.[726]

There is, however, a bridge. These conflicting positions on the Second Amendment are not mutually exclusive: the individual right to keep and bear arms can exist under a federalized system of well-regulated liberty that emphasizes state autonomy in regulating firearms. Examining the competing interpretations of the Second Amendment is an important

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[724] Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 14.
[725] Erwin Chemerinsky, "Putting the Gun Control Debate in Social Perspective," *Fordham Law Review* 72 (2004): 481.
[726] Ibid.

constitutional thought experiment – but not always relevant to everyday politics and must be considered in light of the continuing challenges of guns in America. This dissertation seeks to expand the parameters of the debate by demonstrating how concerns about federalism underscore the broader issue of gun rights, emphasizing the overlooked role of the states in both regulating *and* expanding gun rights. The Supreme Court's position on the Second Amendment is clear: the Second Amendment guarantees an individual right to keep and bear arms for personal self-defense and is incorporated against the states. The assumption behind this interpretation is that the states, left to their own devices, will attempt to limit the individual right to keep and bear arms through onerous regulation. This has not proven to be the case, however, and the states should be empowered to regulate firearms according to their own interests – which does not necessarily mean limiting individual rights. Further, returning authority to the states can rectify the tension between competing legal interpretations of the right to bear arms and the politics of gun rights. A Second Amendment that grants the states a robust role in regulating firearms reflects its long history as a collective right and also allows the legislative process to function as it should in a representative democracy – responding to constituent demands through balanced policymaking – rather than relying on the courts to determine the course of a deeply divisive political issue.

Achieving a Balance

Rather than debate the "correct" interpretation of the Second Amendment – or expect the temperature of the gun fight to lower – it is more pragmatic to accept that the debate will remain contentious, and focus instead on bipartisan policy outcomes that reconcile the interests of gun rights with the necessity of gun control. In order to achieve effective legislation, the rights of gun owners must be balanced with the pursuit of public safety and the broader commitments of

gun control, especially as the technology of weapons becomes increasingly dangerous. Further, the nature of the individual right protected by the Second Amendment must be clearly articulated, then supported by practical policy compromises. For example, it is more likely that balanced legislation would emerge if the individual right to keep and bear arms was understood as something akin to the fundamental right of free expression, which should only be regulated when there is a highly compelling reason to do so – accepting that there *are* many compelling reasons to regulate weapons – and also considering gun control measures as protecting procedural rights (similar to owning a car or operating machinery) which the government must regulate in the name of public safety. In other words, it would be more useful to turn aside from polarizing debates that emphasize extreme positions on gun rights – a universal ban on handguns versus unlimited open carry, for example – and consider policies that balance the constitutional right to bear arms guaranteed by the Second Amendment with the interests of public safety.

Further, the debate about gun rights in American politics is not simply a question of guns, but deeply rooted beliefs about American political identity, broader individual rights claims, and changing patterns of federalism. Traditionally, it has been a state prerogative to regulate the interests of its citizens in everyday matters through a balanced federal scheme; as Alexander Hamilton wrote in *Federalist 17*, "the regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition."[727] For Hamilton, the states need not fear federal interference with quotidian matters because they hold little interest to the federal government. Thus "it is therefore improbable, that there should exist a disposition in the federal councils, to usurp the powers with which they are connected; because the attempt to exercise

[727] Alexander Hamilton, "Federalist 17," in George W. Carey and James McClellan, eds., *The Federalist* (Indianapolis, IN: The Liberty Fund, 2001), 80.

them, would be as troublesome as it would be nugatory."[728] Hamilton was not referring specifically to the right to keep and bear arms, but his description of state authority over practical concerns applies to the contemporary debate about gun rights, both in regulating guns as well as allowing law-abiding citizens their constitutional right to keep and bear arms.

A Threat to the States

In recent years, however, there has been a trend toward nationalizing firearms regulation, which poses a threat to the states and the proper balance of federalism. For example, New Jersey Senator Frank Lautenberg advanced a bill that would allow the federal government to keep records of firearms purchases in a national gun registry, a scheme that was criticized as an inappropriate consolidation of federal power.[729] Further, a federal bill was proposed in 2011 that would limit the states' ability to regulate concealed carry statutes; in the past, the states have had broad latitude to determine who was permitted to carry a concealed weapon within their borders and under what circumstances. By contrast, the bill would require reciprocity between states: a resident of one state holding a concealed carry license would be permitted to carry a concealed weapon in another state regardless of their existing laws.[730] Another federal bill proposed in 2017, the Sportsmen's Heritage and Recreational Enhancement Act (SHARE), would have furthered limited the ability of the states to regulate firearms. Designed to secure broader access to federal land for hunting and recreation, the bill would have permitted gun owners to transport registered weapons across state lines, allowed guns in all state parks, and removed a long-

[728] Hamilton, "Federalist 17," in Carey and McClellan, *The Federalist*, 81.
[729] The Preserving Records of Terrorist and Criminal Transaction Act of 2009 (S. 2820), 1 December 2009.
[730] Jim Abrams, "HR 822 Concealed Carry Bill Passes House Vote," *Associated Press*, 16 November 2011; Tim Schmidt, "Time to Pass National Concealed Carry Reciprocity," *The Hill* (Washington, D.C.), 5 July 2017.

standing transfer tax on silencers.[731] More recently, the House of Representatives has passed the Enhanced Background Checks Act of 2021, which aims to improve the background check process for federal gun licenses.[732] The Biden administration has vowed to curb gun violence by restricting the sale of dangerous weapons and accoutrements (such as untraceable ghost guns and pistol stabilizing braces) as well as urging the states to adopt "red flag" laws, which allow the courts to deny citizens from purchasing weapons if they appear to be a threat to others or themselves.[733] President Biden recently addressed the problem of ghost guns directly, proposing a plan to prohibit the illegal manufacture and sale of "buy build shoot" kits that allow the assemblage of a gun without a background check, along with other measures to tighten the licensing and registration process.[734] Taken on their merits, such proposals are reasonable measures (in the pursuit of both gun control and gun rights) but grant the federal government too much influence, at the expense of the states, in directing the future of gun legislation.

In general, the Bill of Rights was written in response to the Anti-Federalists' critique that the new Constitution was neither sufficiently limited nor federal; in particular, the Second Amendment was a specific guarantee of state protection from federal encroachment by securing the states' right to regulate and arm their militia. Though the institutional foundation of the Second Amendment – the state militia system – no longer exists, it is still the states' prerogative to regulate the right to bear arms, not only to rectify the competing claims of gun rights and gun

[731] Lisa Mascaro, "GOP Still Plans to Vote on NRA-Backed Legislation that Eases Gun Restrictions," *Los Angeles Times* (Los Angeles, CA), 2 October 2017.
[732] The Enhanced Background Checks Act (H.R. 1447), 21 March 2021.
[733] The White House, (https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic), 7 April 2021.
[734] The White House, (https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-cracks-down-on-ghost-guns-ensures-that-atf-has-the-leadership-it-needs-to-enforce-our-gun-laws), 11 April 2022.

control, but also to reconcile how gun regulation should be organized under a balanced federal regulatory scheme. To deny the states the right to legislate firearms according to their interests not only negates the Second Amendment's long history as a collective right, but also raises several problems regarding the proper balance of federalism. First, federalizing gun regulation prevents the states from producing diverse (and hopefully more effective) firearms regulation; second, it diminishes the power of state legislatures to determine the direction of gun control by allowing the courts to play too dominant a role; finally, it denies law-abiding citizens their personal liberties guaranteed by the Constitution. Further, guaranteeing state authority in regulating firearms reconciles the traditional interpretation of the Second Amendment – codified by decades of jurisprudence as a collective right – with the conflicting rulings in *Heller* and *McDonald* by allowing the Second Amendment to function in practice as it was intended by the Framers.

Laboratories of Democracy

There are many benefits of allowing the states to regulate firearms, most notably more diverse and effective gun legislation. Historically, the states have had the upper hand in administering criminal and civil justice, giving them an advantage to the federal government. Alexander Hamilton opined in *Federalist 17*:

> It is this, which, being the immediate and visible guardian of life and property; having its benefits and its terrors in constant activity before the public eye; regulating all those personal interests, and familiar concerns, to which the sensibility of individuals is more immediately awake; contributes, more than any other circumstance, to impress upon the minds of the people affection, esteem, and reverence towards the government.[735]

[735] Hamilton, "Federalist 17," in Carey and McClellan, *The Federalist*, 82.

Hamilton's position holds true today: the states have a long history of regulating firearms based on local customs and regional penchants; while the Second Amendment guarantees American citizens the same right, that right must be regulated differently according to state and local concerns. The states have traditionally been the "natural laboratories" of experimentation with innovative legislation, especially pertaining to contentious issues.[736] Justice Breyer noted in his *Heller* dissent that the states "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Citizens have more opportunities to influence the direction of gun legislation at the local level, which contributes to greater adherence to existing regulations and the creation of more effective laws in the future. Further, states can compare the merits of various policies to determine the success of different programs and adjust their regulations accordingly.

Decentralizing the process of gun regulation allows states to respond to the specific needs and demands of its citizens, which differ both between and within states based on demographics, policy preferences, and local gun culture. State firearms legislation varies widely between the states, even those in close proximity (Massachusetts and New Hampshire, for example) and numerous states have experimented with innovative legislation to balance the danger of guns with the protection of gun rights. Many states have recently adopted comprehensive packages of gun laws to mitigate what they believe to be an inadequate federal response to the problem of violent gun crimes. Proposals have included tightening the licensing process; background checks for concealed carry licenses and private gun sales; limiting access to weapons for those

[736] According to Justice Brandeis in *New State Ice Company v. Liebmann* (1932), "A single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

with mental health issues; and banning assault weapons and high-capacity magazines.[737] Virginia, for example, passed legislation that includes the prohibition of carrying weapons at polling stations, public schools, and on the grounds of the state capital, as well as extending the waiting period for a background check prior to purchasing a weapon.[738] Further, while the federal government has recently acknowledged the problem of ghost guns – untraceable weapons often used by criminals to avoid background checks – many states felt the issue should have been addressed earlier and have already drafted their own legislation. New York, for example, passed the Scott J. Beigel Unfinished Receiver Act in 2021, which established the sale of unfinished frames or receivers used to assemble untraceable weapons as a felony.[739] In contrast, other states have chosen to relax restrictive regulations to allow greater freedom for law-abiding gun owners. Louisiana, Missouri, and Alabama, for example, all have strengthened provisions regarding the right to bear arms in their state constitutions. North Carolina has removed restrictions of carrying loaded weapons in public places, including playgrounds and restaurants.[740] Georgia has gone further, allowing for loaded weapons, included AR-15s, to be carried almost anywhere, barring college campuses, government buildings, and airport security checkpoints.[741] Some states, in fact, have proposed legislation requiring citizens to keep arms and ammunition in their private homes to promote public safety in rural areas without police forces.[742] While gun control

[737] See Drew Desilver, "Most New Gun Laws Since Newtown Ease Restrictions," Pew Research Center (Washington, D.C.), 13 December 2013; Karen Yourish, Wilson Andrews, Larry Buchanan, and Alan McLean, "State Gun Laws Enacted in the Year After Newtown," *New York Times* (New York, NY), 10 December 2013.
[738] Marie Albiges, "These Ten New Virginia Gun Laws Go into Effect Next Week," *The Virginia Pilot* (Norfolk VA), 27 July 2020.
[739] New York State, The Scott J. Beigel Unfinished Receiver Act in 2021 (https://www.nysenate.gov/issues/scott-j-beigel-unfinished-receivers-act).
[740] An Act to Amend State Firearm Laws, North Carolina House Bill 937 (29 July 2013).
[741] The Safe Carry Protection Act of 2014, Georgia House Bill 60 (23 April 2014).
[742] Associated Press, "Kansas Community Requires Households to Have Guns," 23 November 2003; Glenn Reynolds, "A Rifle in Every Pot," *New York Times* (New York, NY), 16 January 2007.

supporters staunchly criticize such measures, they are political wins for gun rights advocates; regardless of the wisdom of such permissive gun laws, however, the states have proven through these various initiatives that regulation need not be overly restrictive to be effective.

Further, the states can address specific local issues through experimental programs to reduce gun violence, which may also inspire other states or localities to adopt similar policies. For example, the city of Richmond approached the issue of gun crimes from a different perspective than nearby Washington, D.C. Rather than limit access to weapons, Richmond launched a program that severely punished all gun offenses, even minor ones. If handguns were virtually impossible to obtain in Washington, they were easily accessible (though carefully regulated) in Richmond, but those caught committing gun crimes would be subject to a federal offense with a minimum prison sentence of five years. "Project Exile" – referring to the exile of gun offenders to federal prisons – was designed to keep weapons out of the hands of dangerous criminals and deter gun crimes. Because Project Exile focused on punishing criminals rather than law-abiding gun owners, the initiative enjoyed the support of both gun control advocates as well as gun rights groups; the NRA lobbied Congress to provide funds to Richmond and other cities interested in launching similar programs. Richmond's example of an innovative gun policy provided an example for other cities to adopt similar programs and has been widely praised as a successful experiment. Project Exile has subsequently been absorbed into the statewide "Virginia Exile," which mandates bail restrictions and the mandatory minimum sentence of five years for all gun offenders.[743]

[743] Project Exile, U.S. Attorney's Office – Eastern District of Virginia" (https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/gun_violence/profile38.html); "Virginia Exile Program," (https://www.suffolkva.us/323/Virginia-Exile-Program); and Gary Fields, "Going After Crimes – and Guns," *Wall Street Journal*, 5 August 2008.

Within states, there are also differences between urban and rural areas in regulating guns that are best addressed by local lawmakers; for example, policies regarding concealed carriage in New York City are more stringent than New York state laws, reflecting concerns about crime, urban violence, and the safety threat of concealed weapons in densely populated areas. Further, gun owners who live outside of New York City must have their permit authorized before they may legally carry their weapons in the city.[744] Other states have implemented projects specific to gun crime in urban areas. For example, programs such as CeaseFire, which involve cooperation between state legislators, law enforcement officials, and reformed criminals to keep guns off the streets, have been successful in cities such as Boston and Chicago. Boston's Operation CeaseFire is particularly novel, employing the networking power of former gang members, known as "violence interrupters," to identify high risk neighborhoods and persuade young people to turn away from guns. [745] Other cities have joined activist coalitions such as Mayors Against Illegal Guns, a group of mayors committed to limiting illegal out-of-state guns from entering their cities; tightening protocols for private gun sales; strengthening permit processes; closing gun show loopholes; and granting wide discretion to local law enforcement authorities in issuing concealed carriage permits.[746]

In sum, federalizing gun regulation prevents states from producing diverse firearms legislation – which, while perhaps cumbersome as an overall regulatory scheme – allows states to diversify their policies based on local interests as well as provide citizens with various

[744]New York State Senate, PEN Section 400 (https://www.nysenate.gov/legislation/laws/PEN/400.00).
[745] Alex Kotlowitz, "Blocking the Transmission of Violence," *New York Times Magazine*, 4 May 2008; see also Anthony A. Braga, David M. Kennedy, Anne M. Piel, and Elin J. Waring, "Reducing Gun Violence: The Boston Gun Project's Operation Ceasefire," U.S. Department of Justice, Office of Justice Programs (National Institute of Justice, 2001).
[746] Mayors Against Illegal Guns (https://mayors.everytown.org).

choices. This is not to say that the states will always produce successful gun legislation, but they should be free to explore experimental regulatory programs that balance the pursuit of public safety with the rights of gun owners, which, even in states with the most restrictive gun laws, are still protected under the Second Amendment. Law-abiding gun owners must be allowed to exercise their right to keep and bear arms under a balanced system that protects rights, but one that also demands individual responsibility to uphold the state's regulatory policies; there is the hope that gun owners will have a closer connection to their state government and will be more likely to cooperate with local laws rather than sweeping federal regulation.

Emboldening State Legislatures

Another consequence of nationalizing gun regulation is that it prevents state legislatures from controlling the direction of gun policy by granting too much power to the courts. If state legislatures are limited in their ability to regulate firearms, the courts will be left to interpret existing regulations as well as impose their vision on future laws. Because gun rights is such a contentious issue, it is crucial to separate the politics of guns from the current legal environment. Prior to *Heller*, the individual right to keep and bear arms for personal self-defense had not been tested; earlier cases dealt with individuals bearing arms under the auspices of the state militia (for example, *Presser* and *Miller*) rather than directly addressing the question of whether the Second Amendment secured an individual right to keep and bear arms for private use. The Supreme Court has since made clear, however, that the Second Amendment protects the individual right to keep and bear arms – which, while legally binding, may not address the most pressing political question concerning gun control and gun rights: what is the best way to balance public safety with the right of law-abiding citizens to own a weapon?

It should be left to the state legislatures, not the courts, to resolve this question: the most democratic branch of government is best suited to reconcile the tenuous balance between public safety and gun rights. There are wide inconsistencies in evaluating gun laws when the courts overstep their role, often resulting in more questions than answers. The ruling in *Heller*, a radical departure from past Second Amendment cases by securing an individual right to keep and bear arms, is remarkably vague in defining the parameters of that right. *Heller* makes a general claim to an individual right to self-defense, qualifying that the weapons protected by the Second Amendment must be in common use and owned by law-abiding citizens for "lawful purposes like self-defense." While the Court presents a catalogue of exceptions – "presumptively lawful regulatory measures," which include highly dangerous and extreme weapons – this list is hardly comprehensive. By neglecting to articulate the boundaries of the newly created individual right to keep and bear arms, and failing to provide lower courts with a standard of review, *Heller* invited a plethora of further litigation as courts struggled to assess challenges to federal, state, and local gun laws. For example, the logic of *Heller* rests heavily on the notion of weapons "in common use," a phrase too ambiguous to provide clear guidance to lower courts in judging the permissibility of gun laws. In the hundreds of gun cases following *Heller*, courts have been required to examine the complicated – and often arbitrary – aspects of various categories of weapons (for example, if a machine gun could be considered in common use for self-defense, or how many times a gun could be fired without manual reloading to be regarded as extreme), technical details beyond the expertise of many judges and better left to state legislatures to evaluate.

Not surprisingly, the courts have been inconsistent in assessing gun laws following *Heller*. For example, the NICS Improvement Amendments Act of 2007 was signed into law

following the Virginia Tech tragedy; the Act secured federal funding for the states to assist in providing records of those deemed mentally ill (thus prohibited from owning a gun) to the NICS database, as well as establishing financial penalties for states that refused to comply. Individuals listed in the database could petition for the removal of their name, leaving it to the state courts to determine if an individual was sufficiently recovered from their mental disability. The results varied widely across the states, resulting in the erratic application of the law, as well as the practical problem of allowing potentially unstable citizens access to weapons. In sum, "States have mostly entrusted these decisions to judges, who are often ill-equipped to conduct investigations from the bench. Many seem willing to simply give petitioners the benefit of the doubt. The results often seem haphazard."[747]

Further, when the courts wield too much influence over gun regulation, the legislative process can be circumvented: rather than working toward more effective gun policies, state legislatures may be tempted to merely evade court rulings with which they disagree. Rather than moderating their laws following *Heller*, for example, Washington, D.C. narrowed its gun regulations even further, establishing sixteen new restrictions on gun ownership. Many of the laws focused on handgun ownership, making it nearly impossible to legally purchase a handgun, as well as requiring those who did obtain a weapon to pay steep fees to register their gun and complete a variety of tests. Further, the new policies banned assault weapons and high-capacity magazines, as well as limited the number of weapons a citizen could acquire in a month. [748] (In

[747] Michael Lao, "Some with Histories of Mental Illness Petition to Get Their Gun Rights Back," *New York Times* (New York, NY), 3 July 2011.

[748] Martin Austermuhle, "How Different Do D.C.'s Gun Laws Look Ten Years After Supreme Court's *Heller* Ruling?," American University Radio (wamu.org/story/18/06/26/different-d-c-s-gun-laws-look-10-years-supreme-courts-heller-ruling), 26 June 2018; see also Justin Wm. Moyer, "'The Culture's Changed': Gun Rights Supporters Mark Ten Years since Landmark Ruling Toppled D.C. Gun Ban," *Washington Post* (Washington, D.C.), 26 June 2018.

response to criticism that the new laws were too harsh, the D.C. Council swiftly repealed certain gun restrictions to prevent legislative action.)[749] Not surprisingly, such onerous restrictions to law-abiding gun owners were quickly challenged in the courts, resulting in a case referred to as *Heller II*, in which Dick Heller challenged D.C.'s registration procedures, the prohibition on assault weapons, and the restriction of large capacity ammunition feeding devices. The result of the case was mixed: several provisions were struct down as overly restrictive – including the requirement that gun owners pass a test prior to purchasing a weapon; that weapons must be inspected as part of the registration process; that a weapon must be re-registered every three years; and that gun owners were limited in the number of weapons they could purchase – but the rest of D.C.'s gun laws were deemed constitutionally permissible.[750] D.C. residents were still subject to some of the strictest gun laws in the country and, rather than focus on bipartisan policy-making to achieve balanced gun laws, Washington D.C. found itself mired in a pattern of litigation dominated by lawyers rather than citizens.

In contrast, some courts have been willing to overturn sensible gun laws in the pursuit of expanding gun rights, often in direct conflict with the state legislature. For example, the Georgia Supreme Court recently ruled that probate judges are required to issue carriage licenses to applicants even if their background check is incomplete. According to Georgia state law, carriage licenses may be denied based on several factors, including past felony convictions, mental health issues, and a history of domestic violence. Due to an increase in license applications, however, securing old criminal records became increasingly burdensome and often subject to clerical errors. The Court ruled that judges should issue "shall carry" licenses even if

[749] Washington, D.C., Local Rule 16.3 Report, No. 08-1289, 2 October 2008.
[750] *Heller et al. v. District of Columbia* (District Court Docket 08-1289), 2010.

the application is incomplete, and only deny a license if the background check demonstrated a clear violation to Georgia's gun laws. Justice Verda Colvin opined, "Mere speculation or uncertainty about an applicant's qualifications for a weapons carry license cannot support a determination that an applicant is ineligible or disqualified."[751] Such a ruling is misguided not only because it allows carriage licenses to be issued without sufficient background information, but it allows the Supreme Court of Georgia to effectively function as a legislature, a clear violation of the separation of powers.

Such examples highlight the tendency for extensive legal battles to distract from the real work of gun regulation, often resulting in conflicting gun laws that further burden the legislative process. *Heller* was a political win for conservatives but, ironically, engaged in the type of judicial activism that conservatives have traditionally criticized: rather than trust the legislative process to determine the direction of gun laws, *Heller* granted the Supreme Court the final word on the meaning of the Second Amendment without articulating its full scope. This is problematic in that it removes citizens from the political process of gun regulation, replacing them with, as Justice Scalia once described, "the elite class from which the Members of [the Court] are selected."[752] Further, it complicates matters for the states, given that their legislative action is now constrained by the Supreme Court's holding as well as encumbered by the subsequent litigation that followed; for example, states are limited by *Heller* from requiring handguns to be trigger-locked inside the home, even if such a measure would contribute to domestic safety and prevent accidental gun incidents. In sum, binding states legislatures to static legal edicts prevents them from responding to the evolving problem of guns and adjusting their

[751] Bill Rankin, "Judges Told to Grant Gun Licenses Even if Background Checks Incomplete," *The Atlanta Journal-Constitution* (Atlanta, GA), 15 December 2021.
[752] *Romer v. Evans* (1996).

policies accordingly. If the institutions of representative democracy are being used correctly, there is no need for judges to interfere in contentious political issues; as Justice Brandeis cautioned, "we must be ever on our guard, lest we erect our prejudices into legal principles."[753]

Securing Individual Rights

Finally, nationalizing the process of gun control is more onerous for law-abiding citizens who would have more personal liberty in their gun choices at the state level. While *Heller* claims to protect an individual right to keep and bear arms, maintaining the collectivist position that emphasizes states' rights over individual rights is actually more effective at protecting the individual right to keep and bear arms – an irony that satisfies competing interpretative claims as well as the political interests of gun control advocates *and* gun rights supporters – which allows for a more balanced debate about the scope of gun regulation. Though *Heller* advanced a robust individual right to keep and bear arms, it also nationalized the question of gun rights and limited the states from creating policies that reflect their citizens' preferences. Further, discussion of the individual right to keep and bear arms is often aligned with a sweeping platform of gun rights, an overly simplistic perspective that negates the interests of those individuals who may prefer to forgo their Second Amendment rights, and the fundamental freedom of all citizens to personal safety. Thus assuring that the states may regulate gun policy according to the demands of their citizens allows for the protection of individual rights for those on both sides of the gun debate.

There is a long tradition of local and state authority over the regulation of individual rights, which continues despite the preeminence of the federal government. Implicit to the Fourteenth Amendment and the subsequent incorporation of the Bill of Rights against the states is that the states will actively deny citizens their rights. While true at certain times over the

[753] *New State Ice Co. v. Liebmann* (1932).

course of American politics, this assumption cannot be taken for granted, especially regarding the right to keep and bear arms. While some states have adopted highly restrictive gun regulations, others have granted wide latitude to gun owners: in general, the East Coast, West Coast, and a handful of Midwestern states tend to be more strict in regulating firearms while the South and Western mountain regions are more lenient.[754] All fifty states have regulations prohibiting citizens from carrying weapons in highly sensitive public places, such as schools, government buildings, and densely crowded public events, with varying degrees of restriction across the states. Some states allow for the public carriage of handguns (with a mandatory permit) while many states have "shall issue" laws, which automatically grant a concealed carriage license to any citizen over twenty-one who meets the state's criteria for gun ownership. Other states (California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, and New York, which trend toward stricter gun laws in general) have more restrictive "may issue" laws based on the citizen's need to carry a concealed weapon.[755] For example, California, ranked first by the Giffords Law Center's Annual Gun Law Score Card, has the most restrictive gun laws in the country, including extensive background checks for the sale of all firearms; strict licensing procedures; bans on assault rifles and large capacity magazines; waiting periods for gun purchases; and a limit to the number of weapons that may be legally purchased in a given time frame.[756] Arkansas, by contrast, merely requires a mental health check and lacks full background assessments, licensing procedures, and assault weapons restrictions.[757] Most

[754] "Annual Gun Law Scorecard," Giffords Law Center to Protect Gun Violence (https://giffords.org/lawcenter/resources/scorecard), 2021.
[755] "Gun Laws Save Lives," Giffords Law Center to Protect Gun Violence (https://giffords.org/lawcenter/gun-laws), 2021.
[756] "Annual Gun Law Scorecard," Giffords Law Center to Protect Gun Violence (https://giffords.org/lawcenter/resources/scorecard/california), 2021.
[757] "Annual Gun Law Scorecard," Giffords Law Center to Protect Gun Violence (https://giffords.org/lawcenter/gun-laws/states/arkansas), 2021.

recently, the Georgia Senate passed a bill that establishes a right to "constitutional carry," removing the requirement for a license and background check to openly carry a firearm.[758]

Differences between the states regarding gun laws vary widely and reflect the diversity of demographics, geography, and cultural preferences, factors that are best left to state and local legislatures to mitigate. By nature of variances at the state level, for example, stringent gun laws will be more appropriate in densely populated urban areas with high instances of gun crimes rather than rural areas where guns are used for hunting and recreation. While states with looser gun laws tend to have higher numbers of gun-related deaths, gun regulation does not necessarily have to be overly restrictive to be effective. [759] Vermont and Utah, for example, maintain very relaxed gun laws but have relatively low levels of violent crime.[760] Some states, in fact, have seen a decrease in crime following "shall issue" laws; Florida, for example, reported a drop in homicides, rapes, and aggravated assault after implementing "shall issue" gun legislation, which was coupled with background checks and a waiting period.[761] While there is debate about the accuracy of statistics regarding "shall carry" laws and decreased crime, political scientists have cautiously admitted that "these laws have not led to the massive bloodbath of death and injury that some of their opponents feared."[762] The states, then, based on their demographics and policy preferences, should be left to determine if such measures are appropriate and how to best administer gun laws to protect the individual rights of their citizens, allowing citizens more

[758] Associated Press, 28 February 2022 (https://www.usnews.com/news/politics/articles/2022-02-28/georgia-senate-passes-bill-ending-gun-license-requirement).
[759] Emma Tucker and Priya Krishnakumar, "States with Weaker Gun Laws Have Higher Rates of Firearm Related Homicides and Suicides," CNN, 20 January 2022 (https://www.cnn.com/2022/01/20/us/everytown-weak-gun-laws-high-gun-deaths-study/index.html).
[760] U.S. Census Bureau, *2011 Statistical Abstract, Crime Rates by State* (August 2011).
[761] John Lott, Jr. and David Mustard, "Crime, Deterrence, and Right-to-Carry Concealed Handguns," *Journal of Legal Studies* 26 (1997): 19.
[762] Ian Ayres and John J. Donahue, "Shooting Down the 'More Guns, Less Crime' Hypothesis," *Stanford Law Review* 55 (2003): 1202.

choices and safeguarding against legal battles that may infringe upon their rights. (For example, law-abiding residents in Washington, D.C. were effectively denied their right to keep and bear arms while the courts argued *Heller II*.)

In Conclusion

An amicus brief filed in *Heller* highlights the importance in state autonomy in gun regulation, situating the Second Amendment in its historical context as a right of the states to arm their militias: "A principal purpose of the Second Amendment is to function as a bulwark against federal intrusion into state sovereignty over militias. That purpose would be undermined, rather than supported, by interpreting the Amendment to authorize federal judicial review of state laws regulating weapons."[763] The local institutions of representative democracy, which allow multiple access points for citizens to engage in the political process, offer the most appropriate forum for addressing the controversial challenge of balancing public safety with individual gun rights. As federal Judge Frank Easterbrook explained in 2015, "The problems that would be created by treating such empirical issues as for the judiciary rather than the legislature – and the possibility that different judges might reach dramatically different conclusions about the relative risks and their constitutional significance – illustrate why courts should not read *Heller* like a statute rather than an explanation of the Court's disposition."[764]

In other words, the various choices made by state legislatures in either restricting gun ownership, or, in other states, promoting gun rights, must be respected as part of the political process of representative democracy and not subject to judicial interference. Addressing the Highland Park, IL, ban on assault weapons, Judge Easterbrook continued: "The best way to

[763] Brief for New York et al. as Amici Curiae is Support of Petitioners, *District of Columbia v. Heller* (2008), 4.
[764] *Friedman v. City of Highland Park*, 784 F.3d (Seventh Circuit), 2015.

evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate, not by parsing ambiguous passages in the Supreme Court's opinions."[765] Given that *Heller* and *McDonald* did not define the full scope of the Second Amendment, state legislatures should be left to determine the direction of gun policies with minimal intrusion by the courts: a sweeping court-mandated regulatory scheme would fail to meet the diverse needs of the states and risk denying citizens of their individual rights. Inevitably, there will be disagreement between states about the ideal way to balance public safety with gun rights; democratically elected local officials, rather than judges, however, are more likely to create gun laws that address the demands of their constituents and protect their individual rights through balanced regulation.

In sum, a Second Amendment that denies the states the right to regulate guns according to their own interests not only raises concerns about individual rights and federalism, but further complicates a highly contentious debate already fraught with problems, especially when constitutional law and public policy conflict. Arguments about gun rights often reflect personal opinions and partisan preferences, which are then conflated with the constitutional protections of the Second Amendment: someone who is "for" the Second Amendment may claim that it guarantees an absolute right to keep and bear arms and any regulation would be considered an infringement on their constitutional rights; in contrast, a person who is "against" the Second Amendment may advance sweeping gun control measures that are both unconstitutional and impractical to execute in practice. (For example, while many believe that concealed carry is outside the parameters of the Second Amendment, a uniform ban on concealed carriage would be impossible to implement.) Constitutionally protected rights are still subject to reasonable

[765] *Friedman v. City of Highland Park*, 784 F.3d (Seventh Circuit), 2015.

regulation, as the Supreme Court made clear in *Heller*. Localizing gun regulation at the state level is more likely to unify supporters of both sides of the debate in a more productive discussion that balances the myriad issues of public safety, gun rights, and the proper balance of state and federal power. The issue of gun rights remains one of the most contentious and politically polarizing debates in American politics. The best possible outcome, most likely achieved at the state level, is to encourage an evenhanded dialogue about constitutional rights and effective gun legislation that balances the individual right to keep and bear arms for private purposes with the reasonable regulation of that right, especially when the safety of others is a concern. *Heller* is firmly entrenched legally and politically, which must be accepted by both gun control supporters and gun rights advocates. To reconcile the constitutional protections of the Second Amendment with the politics of gun rights, those on both sides must be willing to ask what right, specifically, the Second Amendment protects and then address the political implications of reasonably regulating that right.

Using the lens of American political development, this dissertation has addressed the question of how the issue of gun rights is debated and resolved in American politics. The proceeding chapters demonstrate that the issue of gun rights is underscored by broader concerns of individual rights and the proper balance of state and federal authority in securing those rights. By tracking critical junctures over time and identifying when and why changing interpretations of the Second Amendment have influenced the politics of gun control, this dissertation accounts for how the issue of gun rights became one of the most divisive debates in American politics, and offers normative recommendations to balance the constitutional right to keep and bear arms with effective gun control measures. Justice Stevens wrote in his *Heller* dissent: "The question…is not whether the Second Amendment protects a 'collective right' or an 'individual' right.' Surely

it protects a right that can be enforced by individuals." However, arguing "that the Second Amendment protects an individual right does not tell us anything about the scope of that right." Justice Stevens' position reflects the nuanced story of the political development of the Second Amendment: what was once a civic duty, then a settled constitutional protection for the states against federal encroachment, is now a firmly entrenched individual right, but the parameters of that right remain unclear. While the individual right to keep and bear arms is constitutionally protected, however, it is not unlimited; it must be regulated under a balanced federal scheme that favors the states in creating gun policy that reconciles the individual right to keep and bear arms with the fundamental rights of life and liberty, which rely on a reasonable level of safety.

Arguing, as this dissertation does, that the Second Amendment protects the collective right of the people to keep and bear arms under the auspices of a well-regulated state militia conflicts with both the Supreme Court and the court of public opinion. (Even prior to *Heller*, most Americans believed that the Second Amendment protected the individual right to keep and bear arms, with only a small minority maintaining the collectivist position.)[766] But doing so also restores the Second Amendment to its proper place. The institutional foundation of the Second Amendment – the state militia system – no longer exists, but the spirit of the Amendment remains: the Framers intended the right to keep and bear arms to be regulated by the states, which they should be free to do in current times. Under a federalized system of well-regulated liberty that emphasizes state autonomy, the states must regulate the right to keep and bear arms based on the demands of their constituents, which balances the constitutional protections of the Second Amendment with the politics of gun rights. Rather than use the Second Amendment as a

[766] See Tom W. Smith, *2001 National Gun Policy Survey of the National Opinion Research Center* (http://www.mindchanging.com/politics/guncontrolsurvey.pdf).

political weapon, it should be invoked as an instrument of compromise to moderate the highly contentious and politically polarizing debate about gun rights in modern American politics.

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